TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 217.

ANDREW J. DAVIS, APPELLANT,

vs.

HARVEY ALVORD,

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF MONTANA.

FILED OCTOBER 29, 1874.

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1 In the district court, third judicial district in and for the county of Lewis & Clarke, Montana Territory.

HARVEY ALVORD, PLAINTIFF,
vs.
CHARLES HENDRIE, ANDREW J. DAVIS, & PATRICK KELLY, defendants. } Transcript on appeal.

Be it remembered that among the proceedings, records, and pleadings had, made, and filed in the above-mentioned cause herein, are the following, to wit:

On the 22d day of March, A. D. 1873, the defendants filed herein *his* bill of exceptions, which is in words and figures following, to wit:

In third judicial district court, Lewis & Clarke County, Montana Territory.

HARVEY ALVORD
vs.
CHARLES HENDRIE ET AL.

Be it remembered that on the day of March, 1873, that be-
2 ing one of the days of the February term of said court, this cause came on to be heard upon the amended complaint of plaintiff and the answer of Patrick Kelly, and the answer and amended answer of A. J. Davis, two of the defendants in this cause, and which are as follows.

On the 26' day of February, 1872, the plaintiff filed herein his amended complaint, which is in words and figures following, to wit:

In the district court of the third judicial district of the Territory of Montana, within and for the county of Lewis & Clarke.

HARVEY ALVORD, PLAINTIFF,
against
CHARLES HENDRIE, ANDREW J. DAVIS, & PATRICK KELLY, defendants.

The above-named plaintiff, for complaint against the above-named defendants, alleges the following facts, to wit:

1st. That this plaintiff on the first day of August, A. D. 1869, and continuously thereafter until the first day of May, A. D. 1871, pursuant to and under a contract and agreement with the above-named defendant,
3 Charles Hendrie, the owner and proprietor of the mine and premises hereinafter mentioned and described, did and performed work and labor in and about and upon the opening, developing, and working of the hereinafter mentioned quartz-mine, to wit: The thirteen-twentieths of discovery claim, and claims number one (1) and two (2) east from discovery on the Union Lode No. 2, situated in Oyhee Park mining district, in Lewis & Clarke County, in the Territory of Montana, each of said claims being 200 linear feet on said lode, said lode being usually known as the Whitlatch Union quartz-lode, said work and labor so performed being of the value of $2,183\frac{75}{100}$ dollars; and that no part thereof has been paid, except the sum of 290 dollars, paid previous to the hereinafter-mentioned accounting; that on the 25th day of June, A. D. 1871, an account was stated between said defendant and this plaintiff,

and there was then and there found to be due this plaintiff, on account of said labor and work done and performed as aforesaid, in opening and working said mining-grounds as aforesaid, the sum of $1,893\frac{75}{100}$ dollars, and that the said amount is now due and unpaid, and that, by the terms of said contract and agreement, the said amount was fully due and payable on the said date of said accounting. That afterwards, to
4 wit, on the 26th day of June, A. D. 1871, and within sixty days after the last of said work and labor had been done and performed as aforesaid, the plaintiff filed with the recorder of said county of Lewis and Clarke a notice of lien upon said premises, claimed for said indebtedness, containing a just and true account of the demands due and owing to him as aforesaid, after allowing all credits, and containing a correct description of the property to be charged with the lien and verified by the affidavit of plaintiff; and that six months have not elapsed since the filing of said account, description of property, and notice of lien, as aforesaid. That the above-named defendants Andrew J. Davis and Patrick Kelly claim some interest in, and claim upon, and demand against said hereinbefore-described premises, which interests, if any, accrued, and in fact are, subsequent to said lien of plaintiff.

2nd. And for a second and further cause of action against said defendants, this plaintiff shows further to this court: That this plaintiff on the 1st day of August, A. D. 1869, and continuously thereafter until the 1st day of May, A. D. 1871, under and pursuant to a contract and agreement with Charles Hendrie, one of these defendants, the
5 owner and proprietor of the hereinafter mentioned and described buildings, machinery, and premises, did and performed work and labor in and about the building, erection, and repairing of said building, machinery, and premises of the value of $2,183\frac{75}{100}$ dollars, and that no part thereof has been paid, except the sum of 290 dollars paid at divers times previous to the accounting hereinafter mentioned; that on the 25th day of June, A. D. 1871, an account was stated by and between the said Charles Hendrie and this plaintiff, concerning said work and labor done and performed on said buildings, machinery, and premises, as aforesaid, and that at said accounting there was found, and agreed between said parties to be due this plaintiff for said work and labor done, over and above all set-offs and payments, the sum of $1,893\frac{75}{100}$ dollars. The following is a correct description of the premises upon which said work and labor was done, as aforesaid, and upon and against which the notice of lien and account was filed, as hereinafter set forth, to wit: A 20-stamp quartz-mill and buildings, known as
the Discovery mill, situated in Oro Fino Gulch, about one quarter
6 of a mile below Unionville, in Lewis and Clark' County, in Montana Territory, and which was built and used by said Charles Hendrie as a mill for crushing quartz-rock, together with all and singular the machinery and appurtenances therein and thereunto belonging; that the last of said labor was done on the 1st of May, A. D. 1871, and that within sixty days after all of said work and labor was done and performed as aforesaid, to wit, on the 26th of June, A. D. 1871, this plaintiff duly filed with the recorder of said Lewis and Clarke County a notice of lien upon said hereinbefore last-described premises, claimed for said indebtedness last aforesaid, containing a just and true account of the demand due and owing to him as aforesaid, after allowing all credits, and containing a correct description of the property aforesaid so charged with the said lien, and verified by the affidavit of this plaintiff, and that six months have not elapsed since the filing of the same; that said defendants Andrew J. Davis and Patrick Kelly

claim to have some interest in, and claim upon, and demand against, said premises, which interests, demands, and claims, if any, accrued subsequent to, and in fact are subsequent to, the lien
7 of this plaintiff. Plaintiff further avers that no proceedings at law nor in equity have been had or commenced for the recovery of the aforementioned demands. Wherefore plaintiff prays for judgment against said defendant Charles Hendrie, in the amount of the hereinbefore-named indebtedness, to wit, in the sum of three thousand and seven hundred and eighty-seven dollars and fifty cents, together with interest thereon at the rate of ten per cent. per annum from and after the 25th day of June, A. D. 1871, together with his costs in this action. And that it be further ordered, adjudged, and decreed that the said Charles Hendrie, Andrew J. Davis, and Patrick Kelly, and all persons whomsoever claiming under them subsequent to the commencement of this action, be forever barred and foreclosed of all right, title, claim, demand, and lien, and equity of redemption of, in, and to said encumbered premises, mentioned in said several notices of lien and hereinbefore in the several causes of action described and set forth, and that said premises be decreed to be sold according to law, and that the moneys arising from such sales be brought into this court, and
8 that the plaintiff shall be paid from the moneys arising from such sales the amounts of the several indebtednesses aforesaid, together with interest thereon to the time of said payment, and the costs and expenses of this action in the manner and to the extent such proceeds are properly applicable thereto, and that the defendent Charles Hendrie be adjudged to pay any deficiency that may remain after applying all the proceeds of such sales as aforesaid, and that the plaintiff may have such other and further relief as to this court may seem just.

SHOBER & LOWRY,
Attorneys for Plaintiff.

TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

Harvey Alvord, being duly sworn, deposes and says that he is the plaintiff in the foregoing-entitled action; that he has heard read the foregoing complaint as amended by leave of court, and knows the contents thereof, and that he has reason to believe, and does believe, the matters as stated therein are true.

HARVEY ALVORD.

Subscribed and sworn to before me this 26th day of February, A. D. 1872.

9 [NOTARIAL SEAL.] THOS. J. LOWRY,
Notary Public.

On the 6th day of June, A. D. 1872, the defendant, Patrick Kelly, filed herein his answer to said complaint, which is in words and figures following, to wit:

In third judicial district court, Lewis and Clarke county, Montana Territory.

HARVEY ALVORD
vs.
CHARLES HENDRIE, ANDREW J. DAVIS, AND Patrick Kelly.

The separate answer of Patrick Kelly to the complaint of said complainant.

This defendant, now and at all times hereafter saving and reserving

to himself all advantage and benefit of exception that can or may be had or taken to the many errors, uncertainties, and imperfections in said complaint, for answer thereto, or to so much thereof as he is advised it is material or necessary for him to make answer unto, he, answering, says that he is ignorant as to whether said Hendrie, on the first day of August, 1869, and continuously thereafter until the first day of May, 1871, was the owner and proprietor of the mine and premises in said complaint mentioned; but he has been informed and believes that said Hendrie was not the owner of said premises then or at any other
10 time, but only, if any, of a portion thereof, and he therefore denies such ownership, and leaves the said plaintiff to make such proof thereof as he may be advised.

And said defendant, further answering, denies that said complainant performed and did work and labor in and about the opening, developing, and working of the said quartz-mine, to wit, $\frac{13}{20}$ths of discovery claim and claims Nos. 1 & 2 east from discovery on said Union lode No. 2, as described in said complaint; and he denies that said supposed work and labor amounted to the sum of $\$2,183\frac{75}{100}$, or that sum less the said sum of $290.00, as stated in said bill, or any other sum for work on said premises, yet remains due and owing from said Hendrie to said Alvord. And he avers that if any accounting was had between said Hendrie and said complainant on the 25th day of June, 1871, or at any other time, as stated in said bill, by which it was found or agreed that said sum was due to said complainant from said Hendrie for such supposed work and labor, that such accounting was made and had in fraud of the rights of this defendant, and of his codefendant, and to prevent them from recovering
11 their just claims against said premises, as hereinafter stated.

And this defendant, further answering, says that he is ignorant whether or not said complainant filed a lien as alleged in said complaint on the 20th day of May, 1871, and within sixty days of the said alleged labor, &c., was and is in said complaint pretended to have been done and performed by said complainant. But he avers that if such notice of lien was filed that the same was fraudulently done for the purpose of attempting to defeat the collection of the amount due to this defendant from said Hendrie, and that the work and labor alleged to have been done by said Alvord was not such work and labor as by law would or does entitle him to any lien on said premises. And he denies that said complainant is entitled to the relief prayed for, or any other relief whatsoever in this court, on his said complaint, and avers the said claim of said complainant is inequitable. And for further answer to the several causes of action, this defendant denies that during the time, to wit, from the 1st day of August, 1869, to the 1st day of
12 May, 1871, the said complainant did and performed work and labor in and about building, repairing of the buildings and machinery in said complaint mentioned and described of the value of $2,183.75, and that no part thereof has been paid except said sum of $290, and he denies that he did any work and labor on said building and machinery except that during a portion of said time the said complainant was in the employ of said Hendrie as a workman in running said machinery, and as an amalgamator of the ores crushed in said mill. And he, further answering, avers that there is not, as this defendant believes, any sum or sums of money whatever due to said complainant from said Hendrie which are legally or equitably entitled to be declared a lien on said premises.

This defendant, further answering, avers that if any such accounting was had as stated in the second part of said complaint, the said ac-

counting was had for the fraudulent purpose of endeavoring to defeat this defendant and other creditors of said Hendrie from collecting the just indebtedness due and owing from said Hendrie to them.

13 This defendant further shows to the court that the two pretended claims, under such pretended contracts or agreements between said Hendrie and complainant, are for the same identical amounts; that the two credits given to said Hendrie are identical in amount and date, and that the labor claimed to have been done by complainant, mentioned in the second claim of complainant, is alleged to have been done during the same identical interval of time set forth in said first claim, and in which said first-mentioned labor is claimed to have been done, and that the said two claims are utterly inconsistent with each other, and are fraudulent upon their face. And this defendant denies that said complainant is entitled to any relief in this court thereon, but avers that the whole of said claims of said complainant are inequitable and fraudulent as against this defendant.

And this defendant, further answering, says that said plaintiff's complaint is multifarious, and asks for the personal judgment against said Hendrie for the aggregate amount of said two fraudulent claims, and that a general sale may be made of all of said premises described

14 in the two counts of said complaint for the payment of the whole sum supposed and alleged to be due, and that the said bill shows upon its face that this court has not jurisdiction in this cause, and that the relief asked is such as cannot and ought not be granted to said complainant. This defendant further says that he has an interest in in said premises described in the complainant's complaint, viz, claims numbers one and two, east from discovery claim on said lode; and that said interest arose and accrued for work done upon said premises, and that there is due him, said defendant, from said Hendrie, the sum of $235.00, with interest thereon, and for which this defendant claims he is entitled to a lien on said premises which is superior and prior to any claim of said plaintiff. And he further says that he commenced his action in this court, to enforce such lien, on the 27th day of September, 1871, and long prior to the commencement of this action, and which said action of this defendant is now pending in this court. Without this, that any other matter or thing in said complaint contained, and not herein and hereby well and sufficiently answered unto, confessed or

15 avoided, traversed or denied, is true to the knowledge and belief of this defendant. And he prays for judgment against said complainant, and that said complainant's bill be dismissed, and that he have his reasonable costs and charges in this behalf sustained.

CHUMASERO & CHADWICK,
Sol'rs for Kelly.

TERRITORY OF MONTANA,
Lewis & Clarke County, ss:

P. Kelly, being duly sworn, says that he has heard the foregoing answer read, and knows the contents, and that he has reason to believe, and does believe, the facts as therein set forth are true.

PATRICK KELLY.

Subscribed and sworn before me this 5th day of June, 1872.

WM. CHUMASERO,
Notary Public.

On the 6th day of June, A. D. 1872, the defendant, A. J. Davis, filed

herein his answer to the complaint, which is in words and figures following, to wit:

In third judicial district court, Lewis & Clarke County, Montana Territory.

HARVEY ALVORD
vs.
CHARLES HENDRIE, ANDREW J. DAVIS, AND Patrick Kelly.

The separate answer of Andrew J. Davis to the bill of complaint of said complainant.

This defendant now, and at all times hereafter, saving and reserving unto himself all advantages and benefit of exception that can or may be had or taken to the many errors, uncertainties, and insufficiencies in said bill of complaint contained, for answer thereunto, or to so much thereof as it is material or necessary for him to make answer unto, he answering, says, that he is ignorant whether or not said Charles Hendrie was the owner and proprietor of the said premises described in the first division of plaintiff's complaint, but he says that he has been informed and believes that said Hendrie was not during said time the owner of all of the said premises; but that he had an interest only in a portion thereof, and he therefore asks that said plaintiff be put to the proof of his said allegation. And this defendant, further answering on information and belief, denies that said complainant did and performed any labor or work in and about the opening, developing, and working of said quartz-
mine, as described in said complaint, for the doing of which he
17 was or is entitled to any specific lien, statutory or otherwise, upon said premises. He denies that any work and labor therein of said complainant amounted to the sum of $2,183\frac{75}{100}$, or that that sum, less the sum of $290, as stated in said bill, or any other sum for work on said premises entitling said complainant to any lien thereon, yet remains due and unpaid by said Hendricks to said complainant. He avers and charges that if any accounting was had between said Hendrie and said complainant on the 25th day of June, 1871, or at any other time, as stated in said complaint, by which it was found or agreed that said sum was due to said complainant from said Hendrie for such supposed work and labor, that such accounting was had and made for the fraudulent purpose of defeating this defendant in the collection of the debt due and owing from said Hendrie to him, as hereinafter stated. This defendant says he is ignorant as to whether or not said complainant ever filed any liens or notices of liens on said premises, or whether the same was or were filed within the time required by law. But he avers that if any such notice
was filed, the same was done fraudulently, with the intent to de-
18 feat the collection of the demand due and owing from said Hendrie to this defendant. And he further avers that the work and labor alleged to have been done by said complainant was not of the character or nature which would or does by law entitle him to any lien on said premises. And he denies that said complainant is entitled to any relief in this court under his said complaint.

And, for further answer to the second cause of action, this defendant on information and belief denies that during the time therein mentioned said complainant did and performed the work and labor therein alleged by him to have been done and performed, of the value of $2,183\frac{75}{100}$, and that no part thereof has been paid, except said sum of $290.00; and he denies that, by virtue of or in consequence of any work and labor so

done, the said complainant is entitled to any lien on said premises. He, further answering, on information and belief says, that, during the time aforesaid, said complainant was employed and worked in said mill as an amalgamator of the ores crushed in said mill, and that if any sum
19 is due him from said Hendrie, it is upon that account, and not for work which under the statutes of Montana Territory would entitle him to any lien on said premises. This defendant denies, on his belief, that any such accounting as stated and set forth in said complaint was ever had, but he avers that if any such supposed accounting was had, that it was a general accounting of indebtedness claimed to be due to him, the said Alvord, from said Hendrie, and that the same was not the subject of a lien on said premises. And he further avers, that if said Alvord ever filed any notice of lien on said premises, that the same was done in fraud of the rights of this defendant, and with the attempt to obtain an improper and undue advantage over the other creditors of said Hendrie, by using the mechanics' lien-law as a cover and pretense whereby he might secure a priority not given by law.

This defendant further shows to the court that the two pretended claims under such supposed contracts or agreements between said Hendrie and said complainant are for the same identical amounts,
20 for work done during the same identical period of time. That the credits given thereon are for the same amount, and given at the same time, and that the said claims are entirely inconsistent the one with the other, and are fraudulent upon their face.

This defendant, further answering, denies all the equities of said complaint, and avers that said claims of said complainant are inequitable and fraudulent as against this defendant. Defendant, further answering, insists that said complaint is multifarious, and shows upon its face that this court has no jurisdiction, the same asking for relief both at law and in equity; and that the relief asked is such relief as this court hath not the jurisdiction or power to grant.

This defendant further shows that he is interested in all of the said premises in said complaint described, a mortgagee thereof under and by virtue of two certain mortgages, one bearing date 17th Sept., 1870, which was duly acknowledged on that date, and recorded in Lewis and Clarke County, in the recorder's office, in book F of mortgages,
21 page 328, and which was given to secure the payment of two promissory notes, one for $2,000, with interest at the rate of four per cent. per month, dated 15th February, 1869, and the other dated June 7th, 1869, for the sum of $9,444.00, with interest at 4 per cent. per month, said mortgage being given to secure the payment thereof in six months from its date, with interest, as aforesaid, which said notes are now due and payable from said Hendrie to this defendant. The other, dated 10th September, 1868, to secure the sum of $5,400.00, with interest at the rate of 5 per cent. per month, which mortgage was acknowledged 10th Sept., 1868, and recorded on said 10th September, 1868, in Lewis and Clarke County, in book D of mortgages, pages 229, 230, & 231. And the lien of which said mortgage this defendant claims is superior and prior to any claim, lien, or pretended claim or lien of said complainant: without this, that there is any other or matter or thing in said complaint contained, and not herein and hereby well and sufficiently answered unto, confessed or avoided, traversed or denied, is true, to the knowledge or belief of this defendant.
22 And he prays judgment against said complainant, and that he be herein dismissed with his costs and charges herein expended.

CHUMASERO & CHADWICK,
Solrs. for Davis.

TERRITORY OF MONTANA,
Lewis & Clarke County, ss:

Wm. Chumasero, being duly sworn, says he is an attorney of the defendant A. J. Davis; that said Davis is absent from this Territory; that he has heard the foregoing answer read, and knows the contents, and that he has reason to believe, and does believe, that the matters as therein set forth are true.

WM. CHUMASERO.

Subscribed & sworn before me this 6th day of June, 1872.
W. F. CHADWICK,
Notary Public.

On the 18th day of December, A. D. 1872, the plaintiff filed herein his replication to the answer of A. J. Davis, which is in words and figures following, to wit:

In third judicial district court, Lewis & Clarke County, M. T.

HARVEY ALVORD, PLAINTIFF,
vs.
CHARLES HENDRIE, ANDREW J. DAVIS, AND Patrick Kelly, defendants.

23 Now comes the plaintiff, and now, and at all times hereafter, saving and reserving to himself all advantages and benefit of exception that can or may be had or taken to the many errors, uncertainties, and imperfections in the answer of A. J. Davis, and for replication thereunto, or to so much thereof as he is advised it is material or necessary for him to make replication unto, states:

1st. Denies that any settlement or accounting had or made by this plaintiff with said Hendrie was in fraud of the rights of said A. J. Davis, or his co-defendant or any other person, or to prevent said Davis or any one else from recovering any just claims against said premises, or any other premises.

2. Denies that the liens described in plaintiff's complaint were or are fraudulent, or that said liens were filed for the purpose of attempting to defeat the collection of any amount due from said Hendrie to defendant Davis or any other person.

3. Denies that the work performed by this plaintiff was not such labor as entitled this plaintiff to a lien upon the premises described in plaintiff's complaint, and denies that the liens in plaintiff's complaint described are inequitable.

24 And, for replication to defendant Davis' answer to second cause of action, denies that said accounting was had for the purpose of endeavoring to defeat said defendant Davis, or any other creditor or creditors of said Hendrie, or to prevent them from collecting any indebtedness due or owing him, them, or either of them from said Hendrie, and denies that there was any fraudulent accounting between this plaintiff and said Hendrie; denies that the two claims of plaintiff are inconsistent with each other, and denies that they are fraudulent upon their face or in any other manner; denies that the whole or any part of plaintiff's claim is inequitable or fraudulent as against said defendant Davis or any one else; denies that defendant Davis' lien upon said premises, described in plaintiff's complaint, is prior or superior to plaintiff's lien, but avers that plaintiff's lien is superior to the lien of said Davis.

Wherefore plaintiff prays for the relief in his complaint demanded, and for such other and further relief as to this court may seem just and equitable.

SHOBER & LOWRY,
Plaintiff's Attorneys.

25 MONTANA TERRITORY,
Lewis & Clarke County:

Harvey Alvord, being duly sworn, says he is plaintiff in the foregoing entitled cause, and that he has heard read the foregoing replication, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

HARVEY ALVORD.

Subscribed and sworn to before me this 16th day of December, A. D. 1872.

[NOTARIAL SEAL.] THOS. J. LOWRY,
Notary Public.

Service accepted. Copy waived, Decr. 18th, 1872.
CHUMASERO & CHADWICK,
Attys. for Deft. Davis.

On the 18th day of December, A. D. 1872, the plaintiff filed herein his replication to answer of Patrick Kelly, which is in words and figures following, to wit:

In 3rd judicial district court, Lewis & Clarke County, Montana Territory.

HARVEY ALVORD, PLAINTIFF,
vs.
CHARLES HENDRIE, ANDREW J. DAVIS, AND Patrick Kelly, defendants.

Now comes the plaintiff, and now and at all times hereafter,
26 saving and reserving to himself all advantages and benefits of exception that can or may be had or taken to the many errors, uncertainties, and imperfections in the answer of Patrick Kelly, and for replication thereunto or to so much thereof as he is advised it is material or necessary for him to make replication unto:

1st. Denies that any settlement or accounting had or made by this plaintiff with said Hendrie was in fraud of the rights of said Patrick Kelly or his co-defendant, or any other person, or to prevent said Kelly or any other person from recovering any just claims against said premises or any other premises.

2nd. Denies that the liens described in plaintiff's complaint were or are fraudulent, or that said liens were filed for the purpose of attempting to defeat the collection of any amount due from said Hendrie to defendant Kelly or any other person.

3rd. Denies that the work performed by this plaintiff was not such labor as entitled this plaintiff to a lien upon the premises described in plaintiff's complaint, and denies that the liens in plaintiff's complaint described are inequitable.

27 And for replication to defendant Kelly's answer to second cause of action, denies that said accounting was had for the purpose of endeavoring to defeat said defendant Kelly, or any other creditor or creditors of said Hendrie, or to prevent them from collecting any indebtedness owing him, them, or either of them from said Hendrie, and

denies that there was any fraudulent accounting between this plaintiff and said Hendrie. Denies that the two claims of plaintiff are inconsistent with each other, and denies that they are fraudulent upon their face or in any other manner. Denies that the whole or any part of plaintiff's claim is inequitable or fraudulent as against said defendant Kelly or any other person. Denies that said defendant Kelly's lien upon any of the premises described in plaintiff's complaint is prior or superior to plaintiff's lien, but avers that plaintiff's lien is superior to the lien and claim of said Kelly. Wherefore plaintiff prays for the relief in his complaint demanded, and for such other and further relief as to this court may seem just and equitable.

SHOBER & LOWRY,
Plaintiff's Attorneys.

MONTANA TERRITORY,
Lewis & Clarke County:

28 Harvey Alvord, being duly sworn, says he is plaintiff in the foregoing-entitled cause, and that he has read the foregoing replication and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

HARVEY ALVORD.

Subscribed and sworn to before me this 16th day of December, A. D. 1872.

[SEAL.] THOS. J. LOWRY,
Notary Public.

Service accepted. Copy waived Dec'r 18th, 1872.
CHUMASERS & CHADWICK,
Attys. for Deft. Kelly.

On the 13th day of March, A. D. 1873, the defendant, A. J. Davis, filed herein his amendment and supplement to answer, which is in words and figures following, to wit:

In 3rd judicial district court, Lewis & Clarke County, Montana Territory.

HARVEY ALVORD
vs.
CHARLES HENDRIE ET AL.

The defendant, A. J. Davis, by leave of the court, files this his amended and supplemental answer to the complaint of plaintiff,
29 and alleges that on the 2nd day of October, 1869, the said defendant, Charles Hendrie, made and executed and delivered to one Noval Harrison his certain mortgage upon the mill mentioned and described in plaintiff's complaint, to secure the payment of a certain promissory note for the sum of $4,490.00, with interest at the rate of two and one-half per cent. per month, and which said mortgage was duly acknowledged by said Hendrie on the 2nd day of October, 1869, and recorded in book C of mortgages, pages 335 & 336, of the records of Lewis and Clarke County, which said note and mortgage were afterwards, to wit, on the 13th day of December, 1870, for a valuable consideration, assigned to this defendant, who subsequently commenced his action to foreclose the said mortgage in this court against said

Charles Hendrie, and said cause was heard at the present term of this court and decree duly rendered therein in favor of this defendant and against said Hendrie for the sale of said property, the amount ascertained to be due being the sum of $8,759\frac{50}{100}$ dollars, and which is still due and unpaid to this defendant, and is prior to any lien or claim of said plaintiff.

30 And he further avers that on the 26th day of January, 1870, the said defendant', Charles Hendrie and E. B. Hendrie, made, executed, and delivered to one W. B. Evarts his certain mortgage upon the same property described in said last-named mortgage, being the mill, &c., described in plaintiff's complaint; to secure the payment of a certain promissory note for the sum of $1,725.00, with interest at the rate of four per cent. per month, and which note was payable six months after date. That said mortgage was duly acknowledged by said Charles & Ed. B. Hendrie on the 16th day of February, 1870, and recorded on the 17th day of February, 1870, in book F of mortgages, page 129, in Lewis and Clarke County records; that said Evarts, on the first day of December, 1870, for value received, duly assigned to this defendant the said note and mortgage, and that this defendant subsequently, to wit, on the 25th day of February, 1871, commenced his suit in this court to foreclose the same, and that said cause was heard at the present term of this court, and a decree was duly rendered therein in favor of this defendant and against the said Charles and E. B. Hendrie for

31 the sale of said property. The amount ascertained to be due this defendant being the sum of $3,864.00, and which is still due and unpaid to this defendant, and is, as this defendant avers, a prior lien to that of said plaintiff on said mill property.

CHUMASERS & CHADWICK,
Solicitors for Davis.

TERRITORY OF MONTANA,
Lewis & Clarke County, ss:

A. J. Davis, being duly sworn, says he has heard the foregoing supplemental answer read, and that the facts therein stated of his own knowledge are true, and the facts stated on information and belief he believes to be true.

A. J. DAVIS.

Subscribed and sworn to before me this 13th day of March, 1872.
ALEX. H. BEATTIE, *Clerk.*

On the 13th day of March, A. D. 1873, the plaintiff filed herein his demurrer to amendment of A. J. Davis' answer, which is in words and figures following, to wit:

In third judicial district court, Lewis and Clarke County, Montana Territory.

HARVEY ALVORD
vs.
CHARLES HENDRIE ET AL.

32 Now comes the plaintiff and demurs to the amendment to defendant Davis' answer, filed herein, upon the following ground:

1st. That said amendment shows that the mortgages therein pleaded were executed after the plaintiff commenced work upon the property against which he claims a lien in this action.

2nd. Said amendment is no defense to plaintiff's cause of action, as shown by the pleadings and proof.

SHOBER & LOWRY,
Plaintiff's Attorneys.

Whereupon the court entered the following order, overruling the demurrer of plaintiff, to wit:

HARVEY ALVORD
vs.
CHARLES HENDRIE ET AL.

Ordered that the said demurrer be, and the same is hereby, overruled.

And the evidence of the respective parties; whereupon the plaintiff, to sustain the issues on his part, introduced as a witness Harvey Alvord, the plaintiff, who testified as follows:

"I am the plaintiff, and know all of the parties to the suit. In the latter part of July, 1869, Charles Hendrie, one of the defendants, said to me that he wanted to hire me, $2,500.00 a year, to build a
33 mill and keep it in repair, and to do carpenter-work on the mine, and that would be my legitimate business. The work was done on the mine at Unionville, and on the mill in the gulch, about ¼ or ½ a mile below. I commenced work Aug. 1st, 1869, and worked until May, 1871. I had no settlement with Hendrie until I quit work. There was $2,100 & some odd dollars due me on each, mill and mine. Hendrie told Dow not to keep my time, as I was hired by the year. There was to be no lost time and no overtime. The understanding was that my time was to be half on the mill, and half on the mine. Hendrie had the control and management of both mill and mine at the time this contract was made."

On cross-examination the witness stated:

"I am a mill-wright, and do a little of everything, and have done something at amalgamating; was not hired by Hendrie to amalgamate, but was hired to build mill. I built mill and kept it in repair. I put stamps in the mill in 1869, and some more stamps in the fall of 1869. Commenced working on mill Aug. 1, 1869. The mill was all completed, so far as stamps were concerned, in the fall of 1869. It has never
34 been fully completed. Since 1869 have repaired mill as needed, same as any other mill. I think the arastra was put in in the winter of 1869 & '70. In the summer put in a set of iron guides. Nothing was added to the mill after that except repairing as it needed repairing. In the fall of 1869 I worked on the mill in Grizzly Gulch, which was credited on account. The mill was run most of the time until May, 1871. More than half the time I worked half time at mill and half the time at mine. I laid some track and made cars. I am something of a miner. In August, 1869, I fixed a car; am not certain I made a new one. I helped lay a track and built a whim in fall of 1869. I did the work in Grizzly Gulch, and it was brought to the mill. The track I made was on the dump. It might have taken two days to lay the track; was about 40 days, off and on, building the mill in Grizzly Gulch. Hendrie superintended the mine. Kelly was foreman of the mine. In 1870 put up steam hoisting-works on the mine. I laid track, made cars, and did everything necessary to keep mine in repair, and continued work until May 1, 1871. My contract was for $2,500 per annum. Nothing
35 said that I was to have pay before the end of the year, and I was not, I suppose, entitled to pay until the end of the year. The

whole amount of my labor was $4,200.00. I was to get pay one-half from mine and one-half from mill. My contract was to work half on mine and half on mill for the gross sum of $2,500 a year."

The plaintiff then offered in evidence the notice of lien filed by plaintiff, to the introduction of which the defendant Davis, by his counsel, then and there objected; but the court overruled objection, to which ruling said Davis then and there excepted, and the said notice of lien was then read in evidence, and is in words and figures following, to wit:

TERRITORY OF MONTANA,
Lewis & Clarke County:

HARVEY ALVORD }
vs.
CHARLES HENDRIE. }

Know all men by these presents, that I, Harvey Alvord, of Lewis & Clarke County, Montana Territory, have performed labor as a mechanic in the construction of the building known as the "Discovery Mill," being upon the land and premises hereinafter more particularly described.

That it is my desire to avail myself of the benefits of the act of
36 the legislature of Montana Territory, entitled "An act securing liens to mechanics and others," approved December 30, 1864, and all acts amendatory thereof; and that it is my intention to claim a lien upon the premises aforesaid and hereinafter described; and that it is my intention to claim and hold such lien, not only upon the said building, erections, and superstructures, but also upon the land upon which the same are erected, together with a convenient space around the same, (not exceeding one acre,) for the convenient use and occupation of the premises, or upon such interest as the said Charles Hendrie, who caused the said building or superstructure to be erected, had on the 1st day of August, A. D. 1869, when the same was commenced; or at any time since hitherto. That sixty days have not elapsed since the completion and repairing of such building or superstructure; that the following is a correct description of the property to be charged with said lien, to wit: A quartz mill and building known as the Discovery Mill, situate on Oro Fino Gulch, about one-quarter of a mile below Unionville, in

Lewis and Clarke County, Montana Territory, and which has been
37 used by said Charles Hendrie as a mill for crushing quartz rock.

That the labor performed by this claimant was performed per contract with said Charles Hendrie as a mechanic in the construction of said building and keeping the same in repair. That the following is a just and true account of the demand due to the claimant, after deducting all proper credits and offsets.

DEBITS.

Contract price for labor performed in constructing said building $2,183 75

REDUCTION.

Cash and labor at sundry times 290 00

Balance now due $1,893 75

HARVEY ALVORD.

MONTANA TERRITORY,
Lewis & Clarke County:

Harvey Alvord, the claimant in the foregoing notice of lien named, and who subscribed the same, being duly sworn, says that he has read the same and knows the contents thereof, and that the same is in all respects just and true, and contains a just and true account of the demand due him after deducting all proper credits and offsets.

HARVEY ALVORD.

38 Subscribed & sworn to before me this 26th day of June, A. D. 1871.

J. H. SHOBER,
Notary Public, M. T.

Filed June 26th, 1871, at 55 minutes past 3 o'clock p. m.
W. B. MORRISON,
County Recorder,
By LESLIE E. WOOD, *Deputy.*

MONTANA TERRITORY,
Lewis & Clarke County, ss:

HARVEY ALVORD
against
CHARLES HENDRIE.

Know all men by these presents, that I, Harvey Alvord, of Lewis & Clarke County, Montana Territory, have performed labor for the improvement and working of the Whitlatch Union Mine, hereinafter more particularly described, as a laborer; that it is my desire to avail myself of the benefits of the act of the legislature of Montana Territory, entitled "An act to amend an act entitled an act securing liens to mechanics and others," approved December 30, 1864; and that it is my intention to claim a laborer's lien upon the premises aforesaid and hereinafter described, and that it is my intention to claim and hold such lien upon said mine, and all the dips, spurs, and angles thereof, or upon such interest as the said Charles Hendrie had in said mine on the first day
39 of August, A. D. 1869, when this claimant first commenced labor upon said mine; that sixty days have not elapsed since the last labor was performed on said mine by this claimant, which labor was commenced on the first day of August, A. D. 1869; that the following is a correct description of said mine to be charged with said lien, to wit, one thirteen-twentieths interest in and to discovery claim, and claims numbers one and two east from discovery (each claim containing two hundred linear feet) on what is known as the Whitlatch Union Quartz Lode, situate near Unionville, in Lewis & Clarke County, Montana Territory; that the labor performed on said mine was per contract made with said Charles Hendrie; that the following is a just and true account of the demand due to the claimant after deducting all proper credits and offsets.

DEBITS.

Work and labor done on said Whitlatch Union Mine, per contract price	$2,183 75

REDUCTION.

Cash and labor at sundry times	290 00
Balance now due	$1,893 75

40 HARVEY ALVORD.

TERRITORY OF MONTANA,
Lewis & Clarke County :

Harvey Alvord, the claimant in the within notice of intention to hold the lien named, and who subscribes the same, being duly sworn, says that he has read the same and knows the contents thereof, and that the same is in all respects just and true, and contains a just and true account of the demand due him after deducting all proper credits and offsets.

HARVEY ALVORD.

Sworn and subscribed to before me this 26th day of June, A. D. 1871.
[NOTARIAL SEAL.] J. H. SHOBER,
Notary Public, Montana Territory.

Filed June 26th, 1871, at 55 minutes past 3 o'clock p. m.
W. B. MORRISON,
County Recorder.
By L. E. WOOD, *Deputy.*

The plaintiff then called E. B. Hendrie as a witness, who testified as follows:

"I know the parties. Plaintiff worked on the mill and mine. He commenced in August, 1869; worked till May, 1871; I saw him working there every month. He was hired at $2,500.00 a year, and was to
41 do anything required at mill or mine. I know of settlement between father and plaintiff, and that they found amount of two liens due plaintiff. The property was on Government land. He was to put in time equally on mill and mine. His wages were charged equally against mill and mine, and by the terms of the contract he was to apply equal time to mine and mill."

On cross-examination, witness stated:

"I was not present when Alvord was employed. I was once fixing up books when Charles Hendrie told me what the contract was. This was in the early part of 1870. Dow was there until that time. The mill was running in 1869. Stamps were all in in spring of 1870; after that Alvord continued to work and repair mill. There was no original work done in the mill after the guides were put in. Nothing done but repairing after guides put in."

Milo Courtright was then called as a witness for plaintiff, and testified as follows, to wit:

"I know plaintiff. He worked for Hendrie. The ground about the mine is not sectionised; township-lines have not been run."

On cross-examination witness stated:

42 "The plaintiff commenced work in 1869. I saw him building mill latter part of August, 1869. It was finished some time that fall. He put up a house for hoisting and engine in spring of 1870; whim in fall of 1869. The mill was completed by middle of summer of 1870. Saw plaintiff making guides for mill—cleaning up around mill."

J. C. Ricker was then called as a witness by plaintiff, and testified as follows:

"I know the parties. Township-lines where mine is have been surveyed, but it is not sectionised. I have had surveying done."

On cross-examination witness stated:

"That he had purchased his mines on same lead from Government, and other quartz lodes and mill-sites had been sold by the Government."

The plaintiff then offered in evidence a record of certain conveyance purporting to be from J. W. Whitlatch to C. Hendrie, recorded in "H" of deeds, page 264, 265, & 266; to the introduction of which defendant objected. The court overruled the objection, and the said record was read in evidence, to which overruling defendant Davis, by his
43 counsel, then and there excepted. The said conveyance is in the words and figures following, to wit:

JAMES W. WHITLATCH } Deed.
to
CHARLES HENDRIE. }

"This indenture, made and entered into this twenty-fifth day of July, in the year of our Lord one thousand eight hundred and sixty-eight, between James W. Whitlatch, of Helena, in the county of Lewis and Clarke, Territory of Montana, of the first part, and Charles Hendrie, of the same place, of the second part, witnesseth:

"That the said party of the first part, in consideration of the sum of ten thousand dollars to him in hand paid by said party of the second part, the receipt of which is hereby acknowledged, hath granted, bargained, sold, and conveyed, and by these presents doth grant, bargain, sell, and convey unto said party of the second part, and to his heirs and assigns, the following described premises and property, viz: The undivided thirteen-thirtieths of Discovery claim, claim number one (1) east from Discovery; the west half of claim number two (2) east from Discovery; and claim number five (5) east from Discovery, on the Union number two (2) quartz lode, being seven hundred feet more or less;
44 also, the undivided thirteen-thirtieths of the interest conveyed by deed by said James W. Whitlatch to Solomon Meredith, James B. Hubbard, Walter Trumbull, and George M. Pinney, in and to said Union number two (2) quartz lode, lying west of Discovery, excepting only the interest therein conveyed to the Philadelphia Gold and Silver Mining Enterprise Company; also, the undivided thirteen-thirtieths of a certain ranch or timber claim, of one hundred and sixty acres, on which the Union number two (2) is situated, and which said ranch was duly recorded in the recorder's office of the county of Edgerton, now Lewis & Clarke County, by said James W. Whitlatch; also, a mill-site and water-privilege in Grizzly Gulch, with all the tenements on said ranch, and the town of Unionville, comprising a boarding-house, kitchen, family-house, root-house, office, superintendent's house, boarding-house, formerly occupied by Horton, stables and graneries, sleeping-houses, wash-houses, houses on the mines, being thirteen-thirtieths of all the right, title, and interest conveyed by said first party by deed above referred to to the village of Unionville, excepting two
45 acres enclosed by a fence, which is now occupied by the said Philadelphia Gold and Silver Mining Enterprise Company for mill purposes; also, the quartz now out of said mining grounds, taken therefrom, with all the valuable minerals therein; also, all tools or implements of whatever kind used in working the same, and supplies now on hand; also, fifty (50) feet off of the west end of claim number one (1) west from Discovery on the McIntire lode, fifty (50) feet off of the east end of claim No. two (2) west from Discovery on said McIntire lode; twenty (20) feet off of the west end of claim number two (2) west from

said Discovery claim; fifty (50) feet off of the west end of claim number three (3) west from Discovery claim on said lode, and fifty (50) feet off of the east end of claim number four (4) west from Discovery claim on said lode, together with all and singular the hereditaments, appurtenances, privileges, and franchises thereunto belonging. To have and to hold the same to the said party of the second part, his heirs and assigns, forever; the interest hereby intended to be conveyed
46 being the undivided thirteen-thirtieths of all the said property so conveyed by said deed of said Whitlatch to said Meredith and others, and which deed is dated in the month of September, A. D. 1867; and the said James W. Whitlatch doth hereby covenant to and with said party of the second part, that he has good right to convey and sell said premises; that they are clear of incumbrances, and that he will warrant and defend the title thereto against the claims of all persons whomsoever, except against the United States.

"In testimony whereof the said party of the first part hath hereunto set his hand and seal the day and year first above written.

"JAMES. W. WHITLATCH," [SEAL.]

[Internal revenue stamp, $10.00.]

TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

On this 25th day of July, 1868, before me, R. E. Arick, a notary public for said Territory, personally appeared James W. Whitlatch, who is personally known to me to be the person described in and who executed the foregoing instrument in writing, who acknowledged to me that he executed the same freely and voluntarily, for the uses and purposes therein mentioned.

Witness my hand and official seal the date last above written.

47 [NOTARIAL SEAL.] R. E. ARICK,
Notary Public.

Filed and recorded September 10th, 1868, at 5 o'clock p. m.
W. B. MORRISON,
Co. Recorder,
L. E. WOOD, *Deputy.*

Plaintiff then offered to read in evidence a record of certain instruments from Book G of Deeds, page 189, and Book C of Mortgages, page 154. The defendant Davis objected, but waived the production of the original. The court overruled the objection, and defendant Davis then and there excepted, and the same was read in evidence, and are in words and figures following, to wit:

"This deed, made and entered into this sixteenth day of October, in the year of our Lord one thousand eight hundred and sixty-seven, by and between Solomon Meredith and Walter Trumbull, of the county of Edgerton and Territory of Montana, parties of the first part, and Thomas E. Tutt and Daniel G. Tutt, of the county and Territory aforesaid, parties of the second part, witnesseth:

"That the said parties of the first part, for and in consideration of the sum of ten thousand dollars, to them in hand paid by
48 the said parties of the second part, the receipt whereof is hereby confessed and acknowledged, have this day granted, bargained, and sold, and by these presents do grant, bargain, and sell, unto them, the said parties of the second part, and unto their heirs and assigns forever, one undivided one-third of all the following-described quartz-mining and other property, situate in the county of Edgerton and Ter-

ritory of Montana, and being the same property acquired by deeds from James W. Whitlatch to Solomon Meredith, James B. Hubbell, Walter Trumbull, and George M. Pinney, and which respectively bear date September 13, 1867, and September 27, A. D. 1867, and a portion of which said property was conveyed by deed from George M. Pinney to the said Solomon Meredith, bearing date October fifteenth, A. D. 1867, and by deed of like date from James B. Hubbell to the said Walter Trumbull, and known and described as follows, to wit: Discovery claim and claim number one (1) east from Discovery; the west half of claim number two (2) east from Discovery, and claim No. five (5) east from Discovery on the Union
49 number two (2) lode, being seven hundred feet, more or less, as the same appears of record in the office of the recorder of said county of Edgerton; also, all of the one undivided one-third of the interest of the said parties of the first part of, in, and to the said Union No. two (2) quartz-lode, lying west of Discovery, excepting only the interest already conveyed to the Philadelphia Gold and Silver Mining Enterprise Company, with all the dips, spurs, and angles emenating and diverging from said quartz-mining property; also, one undivided one-third of a certain ranch or timber claim of one hundred and sixty acres, on which the said Union No. two (2) quartz-lode is situated, and which said ranch was duly recorded in the recorder's office of the county of Edgerton, by the said James W. Whitlatch; also, one undivided one-fourth of a mill-site and water-privilege in Grizzly Gulch, with all tenements on said ranch, and the town of Unionville, comprising a boarding-house, kitchen, family-house, root-house, office, superintendent's house, boarding-house formerly occupied by Horton, sleeping-houses, stables and granaries, wash-house, houses on the mines; being one undivided
50 one-third of all the interest of said parties of the first part of, in, and to the village of Unionville, excepting only two acres inclosed by fence, and which is now occupied by the said Philadelphia Gold and Silver Mining Enterprise Company for mill-purposes; one undivided one-third of all the quartz now out of said mining ground taken therefrom, with all the valuable minerals therein; also, one undivided one-third of all tools and implements of whatever kind used in working the same, and stores and supplies now on hand for working said mines. No right, title, or interest in claim No. three (3) west from Discovery claim in the above-mentioned lode is intended to be conveyed hereby other than the said interest conveyed to said parties of the first part by virtue of deeds hereinbefore mentioned. Also, one undivided one-third interest in and to fifty (50) feet off of the west end of claim number one (1) west from Discovery, on the McIntire lode; fifty (50) feet off of the east end of claim No. two (2) west from Discovery, on said McIntyre lode; twenty (20) feet off of the west end of claim No.
51 two (2) west from said Discovery claim; fifty (50) feet off of the west end of claim number three (3) west from Discovery claim on said lode, and fifty (50) feet off of the east end of claim number four (4) west from Discovery claim on said lode; also, all the undivided one-third of the right, title, and interest of the said parties of the first part on said lode as acquired by deeds, as hereinbefore mentioned.

"To have and to hold the same, together with all the privileges and appurtenances, tenements, hereditaments, franchises, and privileges thereunto belonging or appertaining, and therewith usually had, held, or conveyed, with all dips, spurs, and angles emenating and diverging from said quartz property, with all gold or silver bearing rock or earth therein.

"And the said parties of the first part covenant and agree, to and with the said parties of the second part, that they will warrant and defend the title to the said one undivided one-third of the property hereinbefore conveyed unto them, the said parties of the second part, their heirs and assigns, against the lawful claim or claims of all persons whomsoever claiming or to claim the same under or by virtue of any
52 deed, conveyance, or incumbrance by, through, or under us.

"In testimony whereof the said parties of the first part have hereunto set our hands and seals this the day and year first herein written.

[Int. rev. stamp, $10.00.]

"S. MEREDITH. [SEAL.]
"WALTER TRUMBULL. [SEAL.]

"Witness:
"JAS. W. WHITLATCH.
"R. C. ARICK."

TERRITORY OF MONTANA,
County of Edgerton, ss:

On this 16th day of October, A. D. 1867, before me, R. E. Arick, a notary public in and for said Territory, personally appeared S. Meredith and Walter Trumbull, who are personally known to me to be the persons described in and who executed the foregoing deed of conveyance, who severally acknowledged to me that they executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

Witness my hand and official seal the date last above written.

[NOTARIAL SEAL.] R. E. ARICK,
Notary Public

Filed for record at 9 o'clock a. m. on the 17th day of October, 1867.
R. C. EWING,
County Recorder.

This agreement, made and entered into this sixteenth day of
53 October, in the year of our Lord *one* eighteen hundred and sixty-seven, by and between Solomon Meredith, Thomas E. Tutt, Dent G. Tutt, and Walter Trumbull, of the County of Edgerton, and Territory of Montana, parties of the first part, and James W. Whitlatch, of the county and Territory aforesaid, party of the second part, witnesseth:

That, whereas the said party of the second part has heretofore conveyed his right, title, and interest in and to discovery claim, claim No. one (1) east from discovery, the west half of claim No. two (2) east from discovery, and claim No. five (5) east from discovery, on the Union No. two (2) quartz-lode, being seven hundred feet, more or less; also, all of the interest of said party of the second part heretofore conveyed by deed, hereinafter mentioned, in and to said Union No. two (2) quartz lode, lying west of discovery, excepting only the interest already conveyed to the "Philadelphia Gold & Silver Mining Enterprise Company;" also, a certain ranch or timber-claim of one hundred and sixty acres, on which the said Union No. two (2) is situated, and which said ranch was duly recorded in the recorder's office of the county of Edgerton aforesaid by the said James W. Whitlatch; also, a mill-site and water-privi-
54 lege in Grizzly Gulch, with all tenements on said ranch, and the town of Unionville, comprising a boarding-house, kitchen, family-house, root-house, office, superintendent's house, boarding-house formerly occupied by Horton, stables and granaries, sleeping-houses,

wash-house, houses on the mines, the same being all the right, title, and interest the said party of the second part conveyed by deed, hereinafter mentioned, to the village of Unionville, excepting two acres inclosed by a fence which is now occupied by the said "Philadelphia Gold and Silver Mining Enterprise Company" for mill purposes; also, all the quartz now out of said mining ground, taken therefrom, with all the valuable minerals therein, also all tools and implements, of whatever kind, used in working the same, and supplies now on hand; also, fifty (50) feet off of the west end of claim No. one (1) west from discovery, on the McIntyre lode; fifty (50) feet off of the east end of claim No. two (2) west from discovery, on said McIntyre lode; twenty (20) feet off of the west end of claim No. two (2) west from said discovery claim; fifty (50) feet off of the west end of claim No. three (3) west from discovery claim on said lode; and fifty (50) feet off of the east end of claim number four (4) west from discovery
55 claim on said lode—all of the above-named property being the same conveyed by the said party of the second part by deed to Solomon Meredith, James B. Hubbell, Walter Trumbull, and George M. Pinney, and which respectively bear date September 13th, 1867, and September 27th, 1867, a portion of which said property was conveyed by deed from Geo. M. Pinney to Solomon Meredith, bearing date October 15th, 1867, and by deed of like date from James B. Hubbell to the said Walter Trumbull, and by the said Solomon Meredith and Walter Trumbull this day conveyed to the said Thomas E. Tutt and Dent G. Tutt; and whereas the said parties of the first part now have and hold the title to the property hereinbefore mentioned:

It is therefore understood and agreed that the said parties of the first part are to have the sole and exclusive superintendence, possession, and control of all the mining property hereinbefore mentioned, and the sole and exclusive management, superintendence, and control of the mining and working of the same as to them shall seem most to their advantage and benefit, from the date hereof to the first day of April, A. D.
56 1868; and for and during the time aforesaid, from the date hereof until the said 1st day of April, 1868, the said parties of the first part are to have and receive to their sole use and benefit all the profits and proceeds arising from mining and working the said quartz-mining property, and all of the gold, silver, and minerals, of whatever nature, therefrom extracted.

And it is further agreed and understood between the parties hereto that all the expenses, debts, and liabilities created and incurred by the said parties of the first part in running and working the property as aforesaid up to the said first day of April, 1868, are to be borne and paid by the said parties of the first part without incurring any expense or liability whatever to the said party of the second part, or creating any incumbrance upon said property.

It is hereby further agreed that at or before the expiration of the time aforesaid, the first day of April, A. D. 1868, for the purpose of more effectually carrying on the mining operations hereinafter mentioned, the said parties of the first part and the said party of the second part are to form themselves into a corporate mining company, to be
57 known as the Whitlatch Union Mining Company, the capital stock of which said mining company shall be three hundred thousand dollars, ($300,000.00;) that the said James W. Whitlatch, party of the second part, shall own one hundred and thirty thousand dollars of said capital stock; the said Solomon Meredith fifty-six thousand six hundred and sixty-six $\frac{66}{100}$ dollars; the said Walter Trumbull fifty-six thousand six hundred and sixty-six & $\frac{66}{100}$ dollars; the said Thomas E. Tutt and

Dent G. Tutt, jointly, the sum of fifty-six thousand six hundred and sixty-six $\frac{66}{100}$ dollars of said capital stock, for which certificates shall be duly issued to the parties aforesaid in proportion to their respective interests in the capital stock of said company on the said first day of April, A. D. 1868, from and after which time the parties aforesaid are to share in the profits and proceeds arising from working or mining the property hereinbefore mentioned according to their respective interests as above set forth, and shall be entitled to a voice in the management, superintendence, and control of the mining and working said property, as well as in all the business and affairs connected therewith, in proportion to the stock or shares he or they may own or
58 control therein, and shall share, in like proportion, all expenses and losses by said company incurred.

It is hereby further agreed and understood that, in the event the said party of the second part shall desire to sell or dispose of any or all of his stock in said company to be formed as hereinbefore mentioned, before the issuing of certificates of said stock, as aforesaid, on the said first day of April, 1868, the said parties hereto will make, execute, and deliver to the said party of the second part, certificates, or other suitable evidences of his interest in said company, which said interest is hereinbefore specially set forth.

In testimony whereof the said parties of the first part, and the said party of the second part, have hereunto set their hands and seals, the day and year first herein written.

S. MEREDITH. [SEAL.]
THOS. E. TUTT. [SEAL.]
DENT G. TUTT. [SEAL.]
WALTER TRUMBULL. [SEAL.]
JAMES W. WHITLATCH. [SEAL.]

Signed in the presence of—
SAMUEL NEEL.
R. E. ARICK.

[Int. rev. stamp, 10 cents.]

59 TERRITORY OF MONTANA,
County of Edgerton, ss :

On this the sixteenth day of October, A. D. 1867, before me, R. E. Arick, a notary public in and for said Territory, personally appeared S. Meredith, Thos. E. Tutt, Dent G. Tutt, Walter Trumbull, and James W. Whitlatch, who are personally known to me to be the persons described in and who executed the foregoing instrument in writing, who severally acknowledged to me that they executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

Witness my hand and official seal, the date last above written.

[NOTARIAL SEAL.] R. E. ARICK,
Notary Public.

Filed for record at 9 o'clock a. m. on the 17th day of October, 1867.
R. C. EWING,
County Recorder.

HELENA, M. T., *Aug.* 1, 1860.

The terms of the within agreement having been fully complied with
I hereby release Thomas E. and Dent G. Tutt from any liabilities con-

tained therein, and the within agreement is rendered null and void, so far as it pertains to Thos. E. and Dent G. Tutt.

JAMES W. WHITLATCH.

In presence of—
W. B. MORRISON,
County Recorder.

E. B. Hendrie was then recalled and testified:

60 "The property described in the instrument read, is the same as property described in plaintiff's complaint."

The plaintiff Alvord was then recalled, and testified:

"I don't know as I am in possession of the property. I have the privilege of taking out quartz, work it, and apply proceeds to indebtedness due to me from Hendrie—money Hendrie owes me for money loaned. Ed. Hendrie gave me the privilege of going to work on the mine."

The plaintiff then rested, and the defendants recalled Harvey Alvord, who testified as follows:

"Hendrie was to pay me by the year, at the end of the year."

Patrick Kelly was then called, and testified:

"I am a miner; worked on Union Whitlatch mine on discovery claim and claim one east from discovery, the same ground mentioned in plaintiff's lien. I went to work at request of C. Hendrie, 1st June, 1869, as a miner. From December, 1869, until spring, I worked as foreman of night-shift, and from then till mine stopped as foreman on day-shift; was there all the time; saw Alvord at work; built hoisting-works, whim, and car in spring of 1870; never saw Alvord lay any track. I laid track myself. I had charge of all the work that was done
61 below ground in mine. Alvord never did anything on mine under ground. Alvord spent most of the time in mill; have seen him cleaning up amalgam."

Sol. Star was then called as a witness, and testified as follows:

"I am receiver of U. S. land-office in Helena. The record produced is the record of the land-office, and contains an entry of purchase of 700 linear feet of Union Whitlatch mine, and is as folows:

Name of claimant.	Name of claim.	When sold.	Number of receipt and certificate.	Embracing lot number—	Section or part of section.	Section.	Township.	Range.	Area.		Purchase-money.		Remarks.
									Acres.	100ths.	Dollars.	Cents.	
Whitlatch Union Mining Company, viz: Walter Trumbull. Dent G. Tutt, and Thomas E. Tutt.	Union lode No. 2, 700 linear feet, Owykee Park mining district, Lewis & Clarke County.	March 4th, 1868.	1.....	37 A & 37 B	S. E. ¼..	10	9 N.	4 W.	1	61	10	00	Patent number 66, dated February 8th, 1870. Recorded vol. 1, page 350 to 356. Patent delivered.

63 which was read in evidence. The patent was delivered to Tutts and Trumbull 8th February, 1870. Defendant Davis then introduced two mortgages in evidence, and which are as follows:

This indenture, made and entered into this tenth day of September, in the year of our Lord one thousand eight hundred and sixty-eight, between Charles Hendrie, of Helena, in the Territory of Montana, of the first part, and A. J. Davis, of Gallatin City, in said Territory, of the second part, witnesseth:

That the said party of the first part, in consideration of the sum of five thousand four hundred dollars, to him in hand paid by said party of the second part, the receipt of which is hereby acknowledged, hath granted, bargained, and sold, and by these presents doth grant, bargain, and sell unto said party of the second part the following-described property and premises, viz: The undivided thirteen-thirtieths of discovery claim, claim No. one (1) east from discovery, the west half of claim No. two (2) east from discovery, and claim No. five (5) east from discovery, on the Union No. two (2) quartz-lode, being seven hundred feet, more or less; also, the undivided thirteen-thirtieths of
64 the interest conveyed by deed by James W. Whitlatch to Solomon Meredith, James B. Hubbell, Walter Trumbull, and George M. Pinney, in and to said Union number two lode, lying west of discovery, excepting only the interest therein conveyed to the Philadelphia Gold and Silver Mining Enterprise Company; also, the undivided thirteen-thirtieths of a certain ranch or timber-claim of one hundred and sixty acres, on which the said Union number two is situated, and which said ranch was duly recorded in the recorder's office in the county of Edgerton, (now Lewis & Clark' County,) by said James W. Whitlatch; also, a mill-site and water-privilege in Grizzly Gulch, with all the tenements on said ranch, and the town of Unionville, comprising a boarding-house, kitchen, family-house, root-house, office, superintendent's house, boarding-house formerly owned by Horton, stables and granaries, sleeping-houses, wash-houses, houses on the mines, being thirteen-thirtieths of all the right, title, and interest conveyed by said Whitlatch by the deed above referred to, to the village of Unionville, excepting two acres inclosed by a fence, which is occupied by said Philadelphia Gold and Silver Enterprise Company for mill purposes; also, the quartz now out of said mining ground and taken therefrom, with
65 all the valuable minerals therein; also, all tools and implements of whatever kind used in working the same, and supplies now on hand; also, fifty (50) feet off of the west end of claim number one (1) west from discovery, on the McIntyre lode; fifty (50) feet off of the east end of claim number two (2) west from discovery, on said McIntyre lode; twenty (20) feet off of the west end of claim number two (2) west from said discovery claim; fifty (50) feet off of the west end of claim number three (3) west from discovery claim, on said lode, and fifty (50) feet off of the east end of claim number four (4) west from discovery claim on said lode, together with all and singular the hereditaments, appurtenances, privileges, and franchises thereunto belonging:

To have and to hold the same to said party of the second part, his heirs or assigns; the just and full sum of five thousand and four hundred dollars, in sixty days after the date hereof, with interest at the rate of five per cent. per month, payable monthly after maturity thereof, according to the condition of a certain promissory note, bearing even date herewith, executed by said first party to said second party, then this instrument and said note shall cease and be null and void;
66 otherwise to remain in force. It is also expressly agreed that in

case of foreclosure of this instrument to enforce the collection of the sum secured to be paid hereby, that all the costs and expenses thereof, including attorneys' fees, shall be added to said sum and paid by said party of the first part.

In witness whereof the party of the first part hath hereunto set his hand and seal the day and year first above written.

[SEAL.] CHAS. HENDRIE.

[Rev. stamp, $5.50, canc'd.]

TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

On this 10th day of September, A. D. 1868, personally appeared before me, W. B. Morrison, clerk in and for said county, Chas. Hendrie, to me known to be the same person described in, and who executed, the foregoing mortgage, who acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein mentioned.

Witness my hand and seal of said county the day and year aforesaid.

[COUNTY SEAL.] W. B. MORRISON,
County Clerk.

Filed and recorded September 10th, 1868, at 5 o'clock p. m., in book D of mortgages, on pages 229, 230, & 231, Lewis & Clarke County records, Montana Territory.

W. B. MORRISON,
Co. Recorder,
By L. E. WOOD, *Deputy.*

67 This indenture, made the 17th day of September, in the year of our Lord one thousand eight hundred and seventy, between Charles Hendrie, of the county of Lewis and Clarke, and Territory of Montana, party of the first part, and A. J. Davis, of the county of Gallatin, and Territory aforesaid, party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of nineteen thousand eight hundred and fifty-two & $\frac{74}{100}$ dollars, to him in hand paid by the said party of the second part, the receipt of which is hereby acknowledged, has granted, bargained, and sold, and by these presents does grant, bargain, sell, alien, confirm, and convey unto the said party of the second part, his heirs and assigns, forever, all the following quartz-mining property, situate in the county of Lewis & Clarke, near the town of Unionville, and Territory of Montana, and more particularly described as follows, to wit: All the interest of the party of the first part in discovery claim, claim number one (1) east from discovery, the west half of claim number two (2) east from discovery, and claim number five (5) east from discovery, on the

68 Union number two (2) quartz-lode, being seven hundred feet, more or less; also, all the interest of the said Hendrie in a certain ranch or timber-claim, of one hundred and sixty acres, on which said Union number two (2) is situated, and which is the same interest in said ranch as was heretofore purchased by said Chas. Hendrie from James W. Whitlatch, and a mill-site and water-privilege in Grizzly Gulch, with all the tenements on said ranch, including those heretofore purchased from James W. Whitlatch; also, all the machinery of every kind used for working the aforesaid mining-ground; also, fifty (50) feet off of the west end of claim number one (1) west from discovery, on the McIntyre lode; fifty (50) feet off of the east end of claim number two (2) west from discovery on said McIntyre lode; twenty (20) feet off

of the west end of claim number two (2) west from Discovery claim; fifty (50) feet off of the west end of cla m number three (3) west from discovery on said lode, and fifty (50) feet off of the east end of claim number four (4) west from discovery on said lode; also, all the interest of the party of the first part in and to a certain twenty (20) stamp steam quartz-mill in said county, situate in Oro Fino Gulch, and known
69 as the Hendrie quar z-mill, together with all the machinery, fixtures, and appurtenances thereto belonging or in anywise appertaining:

To have and to hold the above-granted and described property, together with its dips, spurs, and angles, and all the quartz rock, ore, and mineral contained therein, and all the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, unto the said party of the second part, his heirs and assigns forever. This conveyance is intended as a mortgage to secure the payment of two several (duly stamped) promissory notes, in words and figures as follows, to wit: one of said notes is as follows:

"$2,000.00. HELENA, *February 15th*, 1869.

"For value received, we promise to pay A. J. Davis, or order, the sum of two hundred dollars, with interest at the rate of four per cent. per month until paid, interest payable monthly.

(Signed) "CHAS. HENDRIE.
"HARVEY RAY, JR."

The other of said notes is as follows, to wit:

"$9,444.00. HELENA, *June 7th*, 1869.

"For value received, we promise to pay A. J. Davis, or order,
70 the sum of nine thousand four hundred and forty-four dollars, with interest at the rate of four per cent. per month, interest payable monthly, and if not paid at the end of each month to bear the same interest as the principal.

(Signed) "CHAS. HENDRIE.
"HARVEY RAY, JR.

"CHAS. HENDRIE & SON."

Now, if the aforesaid notes and interest shall be well and truly paid within six months from this date, then these presents shall be void. But if said notes and the interest thereon shall not be well and truly paid within six months from this date, as above specified, then the party of the second part, his executors, administrators, and assigns, are hereby empowered to sell the said premises and property, with all and every of the appurtenances, or any part thereof, in the manner prescribed by law, and out of the money arising from such sale to retain the said principal and interest, together with the costs and charges of making such sale, and the overplus, if any there be, shall be paid by the party making such sale, on demand to the said party of the first part, his heirs or assigns.

And it is hereby agreed that it shall be lawful for the party of
71 the second part, his heirs, executors, administrators, or assigns, to pay and discharge at maturity all taxes or assessments, liens, or other incumbrances now subsisting or hereafter to be laid upon or imposed upon the aforesaid property, or any part thereof, and which may be in effect a charge thereupon, and such payments shall be allowed, with interest thereon at the rate of four per cent. per month, and such

payments and interest shall be considered as secured by these presents, and a charge upon said premises, and may be deducted from the proceeds of the sale above authorized.

In testimony whereof the said party of the first part has hereunto set his hand and seal the date first herein above written.

CHAS. HENDRIE. [SEAL.]

Signed, sealed, and delivered in the presence of—
ALEX. M. WOOLFOLK.
WILL. F. BULLARD.

TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

On this sixteenth day of September, in the year of our Lord one thousand eight hundred & seventy, personally appeared before me, Massena Bullard, a notary public in and for said county, Charles Hendrie, personally known to me to be the same person described in and who
72 executed the foregoing instrument, and who acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[NOTARIAL SEAL.] MASSENA BULLARD,
Notary Public.

Filed and recorded Septr. 19th, 1870, at 10.30 a. m., in book F of mortgages, pages 328, 329, & 330 of the records of Lewis & Clarke County, Montana Territory.

W. B. MORRISON,
County Recorder,
Per B. S. WORD, *Deputy.*

The defendant Davis then introduced the summons, returns thereon' complaints and decrees in cases in this court Nos. 1407 & 1411, and which are as follows:

In the district court of the third judicial district of the Territory of Montana, in and for the county of Lewis and Clarke.

ANDREW J. DAVIS, PLAINTIFF,
vs.
CHARLES HENDRIE, DEFENDANT. } Summons.

The people of the Territory of Montana send greeting to defendant
73 You are hereby required to appear in an action brought against you by the above-named plaintiff in the district court of the third judicial district of the Territory of Montana in and for the county of Lewis and Clarke, and to answer the complaint filed therein, within ten days (exclusive of the day of service) after the service on you of this summons, if served within this county, or if served out of this county, but in this district, within twenty days, otherwise within forty days, or judgment by default will be taken against you, according to the prayer of said complaint. The said action is brought to recover judgment against defendant for the sum of four thousand four hundred and ninety dollars, with interest from the 2nd day of October, 1869, at the rate of

two and one-half per cent. per month, besides costs of action, the said amount being due from defendant to plaintiff on a certain promissory note set out in the complaint, on file herein, and also to obtain a decree of this court foreclosing a certain mortgage executed by said defendant,
and given to secure the payment of said note; that the premises
74 therein described be sold according to law, and proceeds applied to payment of said judgment, and for general relief. And you are hereby notified that if you fail to appear and answer the said complaint as above required, the said plaintiff will take default against you, and apply to the court for the relief demanded in said complaint.

Given under my hand and the seal of the district court of the third judicial district of the Territory of Montana, in and for the county of Lewis & Clarke, this 23d day of February, in the year of our Lord one thousand eight hundred and seventy-one.

[SEAL DIST. COURT.] W. S. SCRIBNER, *Clerk*,
By CHAS. G. REYNOLDS,
Deputy Clk.

OFFICE OF THE SHERIFF OF THE COUNTY OF LEWIS & CLARKE.

I hereby certify that I served the within summons on the 20th day of March, A. D. 1871, by delivering to Chas. Hendrie a copy of the within and showing to him the within summons, in Lewis and Clarke County, M. T.

W. L. STEELE, *Clerk.*

Filed March 21, 1871. Scribner, clerk. R.

ANDREW J. DAVIS, PLAINTIFF,
vs.
CHARLES HENDRIE, DEFENDANT. } Complaint.

75 In the district court, 3rd judicial district, in and for the county of Lewis and Clarke, & Territory of Montana.

Now comes the plaintiff in the above-entitled cause, and complains unto this honorable court of the defendant therein, and for cause states, that on the 2nd day of October, A. D. 1869, said defendant, at the county of Lewis and Clarke, in the Territory of Montana, made, executed, and delivered to one Norval Harrison his certain promissory note for the sum of four thousand four hundred and ninety dollars, for value received, due and payable nine months from the date thereof, with interest thereon from date at the rate of two and one-half per cent. per month; that for the purpose of securing the payment of the said promissory note, according to the term and effect thereof, on the day and year last aforesaid, said defendant, under his hand and seal, also made, executed, and delivered to the said Norval Harrison his certain mortgage upon the property in said mortgage described, conditioned for the payment of said promissory note and interest, according to the term and effect
thereof, a copy of which said mortgage is hereto attached,
76 marked "Exhibit A," and made a part of this complaint, to which reference is made; that hereafter, to wit, on the 4th day of October, A. D. 1869, at 9½ o'clock, a. m. of said day, said mortgage, duly cerified, acknowledged, and stamped according to law, and recorded in the recorder's office of Lewis and Clarke County, in which said property was situated, in book E of mortgages, on pages 335 & 336; that no part of said note and mortgage has been paid to said Norval Harri-

son; that on the 13th day of December, A. D. 1870, the said Norval Harrison, for a valuable consideration, endorsed said note and duly assigned said mortgage, delivered both thereof to this plaintiff, who hath ever since been and now is the lawful owner and holder thereof; that said defendant failed and neglected to fulfill and perform the conditions upon his part, and has wholly failed and neglected to pay said note and mortgage, or any part thereof, according to the term and effect of the same; that there is now due this plaintiff thereon the sum of four thousand four hundred and ninety dollars, with interest thereon from
77 the said 2nd day of October, A. D. 1869, at the rate of two and one-half per month. Wherefore plaintiff prays judgment against said defendant for said sum of four thousand four hundred and ninety dollars, with interest thereon from said 2nd day of October, 1869, at the rate of two and one-half per cent. per month, with the costs and expenses of sale; that the usual decree be made for the sale of said premises described in said mortgage by the sheriff of said county of Lewis and Clarke, in the Territory aforesaid, according to the law and practice of this court; that the proceeds of said sale be applied to the payment of said judgment and costs and expenses of said sale; that said defendant and all persons claiming under him since the execution and recording of said mortgage be forever barred and foreclosed of all encumbrances, equity of redemption, and title of, in, and to said property, and that said plaintiff may have judgment and execution against said defendant for any deficiency that may remain after applying the proceeds of said sale as aforesaid; that said plaintiff, or any of the parties to this suit, may become purchasers at such sale; that the sheriff
78 execute the proper certificate to the purchaser or purchasers, and that, at the expiration of the time allowed by law for the redemption of said property, said purchaser or purchasers, upon the production of the sheriff's deed therefor, be let into possession of said premises, and that plaintiff have his costs in this action, with such other and further relief as may be just and equitable.

TOOLE & TOOLE,
Attorneys for Plaintiff.

TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

E. W. Toole makes oath and says that he is attorney for plaintiff; that he knows the contents of the foregoing complaint, and that he has reason to believe, and does believe, the matters therein stated to be true.

E. W. TOOLE.

Subscribed & sworn to before me this 21st day of February, A. D. 1871.

Witness my hand and notarial seal this the day and year last aforesaid.

[NOTARIAL SEAL.] MASSENA BULLARD,
Notary Public.

EXHIBIT A.

This indenture, made the second day of October, in the year of our Lord one thousand eight hundred and sixty-nine, between Charles Hendrie, of the county of Lewis and Clarke, and Territory of Montana,
79 party of the first part, and Norval Harrison, of the county of Joaquin, and State of California, the party of the secoad part, witnesseth:

That the said party of the first part, for and in consideration of the sum of four thousand four hundred and ninety-dollars, lawful money of the United Stales of America, to him in hand paid, does grant, bargain, sell, convey, and confirm, unto the said party of the second part, and to his heirs and assigns forever, all that certain twenty-stamp quartz-mill, machinery, stamps, and fixtures, boilers, engines, appurtenances, appliances, tenements, and hereditaments, including the building enclosing the same, situate at the crossing of the Unionville and Dry-Gulch roads in Oro Fino Gulch, in the county of Lewis and Clarke, and Territory of Montana, and being the property now owned and occupied by the said party of the second part, and known as the Hendrie mill, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining. This conveyance is intended as a mortgage, to secure the payment of a
80 certain promissory note of even date herewith, and executed by the said party of the first part to the said party of the second part for the sum of four thousand four hundred and ninety dollars, due and payable nine months from the date thereof, with interest thereon from date until paid, at the rate of two and one-half per cent. per month, and these presents shall be void if such payment be made, but in case default be made in the payment of the principal or interest as in said note provided, then the said party of the second part, his executors, administrators, and assigns, are hereby empowered to sell the said premises, with all and every of the appurtenances or any part thereof, in the manner prescribed by law, and out of the money arising from such sale to retain the said principal and interest, together with the costs and charges of making such sale, and the overplus, if any there be, shall be paid by the party making such sale, on demand, to the said party of the first part, his heirs or assigns.

In witness whereof the said party of the first part has here-
81 unto set his hand and seal the day and year first above written.

CHARLES HENDRIE. [SEAL.]

Signed, sealed, and delivered in presence of—
EDWIN W. TOOLE.
A. E. MAYHEW.

[Int. rev. stamp $4.50.]

TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

On this second day of October, A. D. 1869, (one thousand eight hundred and sixty-nine,) personally appeared before me, Massena Bullard, a notary public in and for said county, Charles Hendrie, personally known to me to be the person described in and who executed the foregoing instrument, and acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand, and affixed my official seal, the day and year in this certificate first above written.

[SEAL.] MASSENA BULLARD,
Notary Public.

Filed and recorded October 4th, A. D. 1869, at 9½ o'clock a. m.
W. B. MORRISON,
County Recorder,
By B. JENKINS,
Deputy.

MONTANA TERRITORY,
Lewis & Clarke County, ss:

I, W. B. Morrison, county recorder of said county, do hereby certify that the foregoing is a full, true, and correct copy of a mortgage executed by Charles Hendrie to Norval Harrison, as the same appears of record in book E of mortgages, pages 335 & 336, of the records of said county.

Witness my hand and the seal of said county affixed, this 21st day of February, A. D. 1871.

{ COUNTY SEAL. }

W. B. MORRISON,
County Recorder,
By BEN. S. WORD, *Deputy.*

[6-c. int. rev. stamp, cancelled.]

In the district court of the third judicial district of the Territory of Montana, in and for the county of Lewis and Clarke.

ANDREW J. DAVIS, PLAINTIFF,
against
CHARLES HENDRIE, DEFENDANT.

Decree of foreclosure and sale, in open court, A. D. 18 .

This cause having this day been brought on to be heard upon the complaint filed therein, taken as confessed by the defendant, Charles Hendrie, (whose default for not answering thereto has been duly
83 entered,) and the court having heard the proofs necessary to enable it to render judgment herein, and it appearing to the court, from the facts and stipulation on file in this court, that there is now due to the plaintiff from the said defendant, for principal and interest upon the debt and mortgage mentioned and set forth in the complaint, the sum of eight thousand seven hundred and fifty five and $\frac{50}{100}$ dollars, which sum is to draw and bear interest at the rate of ten per cent. per annum; and that all the allegations in the said plaintiff's complaint contained are true: Now, on motion of Toole & Toole, of counsel for the plaintiff, it is adjudged and decreed that all and singular the mortgaged premises mentioned in the said complaint, and hereinafter described, or so much thereof as may be sufficient to raise the amount due to the plaintiff, for the principal and interest and costs in the suit and expenses of sale, and which may be sold seperately without materially injury to the parties interested, be sold at public auction by or under the direction of the sheriff, master, or commissioner of the county
84 of Lewis and Clarke, where said mortgaged premises are situate; that said sale be made in Lewis and Clarke County; that the said sheriff shall give public notice of the time and place of such sale, according to the course and practice of the court and the law relative to sales of real estate under execution; and that the plaintiff, or any of the parties to this suit, may become the purchaser at such sale; and that the said sheriff, master, or commissioner, after the time allowed by law for redemption has expired, execute a deed to the purchaser or purchasers of the mortgaged premises on the said sale, and let such purchaser into possession thereof; that the said sheriff, out of the proceeds of said sale, retain his fees, disbursements, and commissions on said sale, and pay to the plaintiff, or his attorney, out of said proceeds, costs in this suit, taxed at $, and due as aforesaid, together with interest thereon at the rate of ten per cent. per annum from the date of this decree, or so much thereof as the said proceeds of sale will pay of the same, (and that the said sheriff take receipts for the amount so paid,

and return the same to this court, with his report of sale, and
85 that he bring the surplus money arising from said sale, if any
there be, into court such surplus shall have been received, and
shall be ascertained, to abide the further order of this court;) that the defendant, and all persons claiming or to claim from or under him, and all persons having liens subsequent to said mortgage, by judgment or decree upon the land described in said mortgage, and his or their personal representatives, and all persons having any lien or claim by or under such subsequent judgment or decree, and their heirs or personal representatives, and all persons claiming under them, *and* be forever barred and foreclosed of and from all equity of redemption and claim of, in, and to said mortgaged premises, and every part and parcel thereof, from and after the delivery of the said sheriff's deed.

And it is further adjudged and decreed that the purchaser or purchasers of said mortgaged premises at such sale be let into possession thereof, and that any of the parties to this action who may be in possession of said premises, or any part thereof, and any person who since the commencement of this action, has come into possession under
them or either of them, deliver possession thereof to such pur-
86 chaser or purchasers, on the production of the sheriff's deed for
said premises, or any part thereof.

And it is further adjudged and decreed that if the moneys arising from the said sale shall be insufficient to pay the amount so found due to the plaintiff, as above stated, with the interest and costs, and expenses of sale, as aforesaid, the sheriff specify the amount of such deficiency and balance due to the plaintiff in his return of said sale, and that, on the coming in of said return, a judgment of this court shall be docketed for such balance against the defendant, Charles Hendrie; and that the defendant, Charles Hendrie, who is personally liable for the payment of the debt secured by the said mortgage, pay to the said plaintiff the amount of such deficiency and judgment, with interest thereon at the rate of ten per cent. per annum from the date of said last-mentioned return and judgment, and that the plaintiff have execution therefor.

The description and particular boundaries of the property authorized to be sold under and by virtue of this decree, so far as the same can be
ascertained from the mortgage above referred to, or from the
87 complaint filed in this action, are as follows, to wit: One twenty-
stamp quartz mill, in Oro Fino Gulch, Lewis and Clarke County, M. T., being about four hundred yards below the mill of the National Mining Company, and known as the Hendrie Mill, together with all the machinery, fixtures, and appurtenances belonging to said mill and the ground upon which the same is situate.

D. S. WADE,
Judge Third Judicial District Court, Lewis and Clarke County, Montana.

ANDREW J. DAVIS, PLAINTIFF,
vs.
CHARLES HENDRIE & ED. B. HENDRIE, DEFENDANTS.

In the district court 3rd judicial district, in and for the county of Lewis and Clarke, and Territory of Montana.

Now comes the plaintiff in the above-entitled cause and complains of the defendants therein, and for cause states:

1. That on the 26th day of January, A. D. 1870, at the city of Helena, in the county and Territory aforesaid, said defendants executed and

delivered to one W. B. Evarts their certain promissory note, whereby they jointly and severally promised to pay the said W. B. Evarts or order the sum of seventeen hundred and twenty-five dollars, six
88 months after the date thereof, for value received, with interest, after maturity, at the rate of four per cent. per month; that no part of said note or interest has been paid.

2nd. That, for the purpose of securing the payment of the said promissory note, said defendants, under their hands and seals, made and delivered to the said W. B. Evarts their certain mortgage, dated February 15th, A. D. 1870, conditioned for the payment of said note and interest, according the tenor thereof, a copy of which said mortgage is hereunto attached, marked "Exhibit A," and made a part of this complaint, and to which reference is made; that said mortgage contained a correct description of the mortgaged property, was duly stamped, acknowledged and certified, as required by law, and recorded in the recorder's office of said county of Lewis and Clarke, in book F of mortgages, on page 129, at 9 o'clock a. m. of the 17th day of February, A. D. 1870.

3rd. That on the first day of December, 1870, the said W. B. Evarts duly assigned said note and mortgage, and delivered the same to this plaintiff for a valuable consideration; that said defendants have wholly failed to keep and perform the conditions of said mortgage on
89 their part; that there is now due and unpaid thereon the sum of seventeen hundred and twenty-five dollars, with interest thereon from the 26th day of July, 1870, at the rate of four per cent. per month; that this plaintiff hath, ever since said assignment, and now is the lawful owner and holder of said note and mortgage. Wherefore plaintiff prays judgment against the said defendants for said sum of seventeen hundred and twenty-five dollars, with interest thereon from the said 26 day of July, 1870, at the rate of four per cent. per month, and costs of suit; that the usual decree may be made for the sale of said premises by the sheriff of Lewis and Clarke County, Montana Territory; that the proceeds of such sale be applied to the payment of the amount due plaintiff, principal and interest, and costs and charges of sale; that said defendants and all persons claiming under them subsequent to the execution of said mortgage upon the premises therein described be forever barred and foreclosed of all right, claim, or equity of redemption in said premises; and that plaintiff may have judgment and execution against said defendants for any deficiency, after the proceeds of such sale to said judgment as aforesaid; that this plaintiff, or any
90 of the parties to this suit, may become purchasers at such sale; that said sheriff execute a certificate to said purchaser, and that he be let into possession upon the production of the sheriff's deed for said premises; and that this plaintiff may have such other or further relief as to this hon. court may seem just and equitable.

TOOLE & TOOLE,
Attorneys for Plaintiff.

TERRITORY OF MONTANA,
County of Lewis and Clarke, ss:

E. W. Toole makes oath, and says that he is attorney for the plaintiff in this action; that he has read the foregoing complaint and knows the contents thereof, and that he has reason to believe, and does believe, the matters therein stated to be true.

E. W. TOOLE.

Subscribed and sworn to before me this 23rd day of February, A. D. 1871.

CHAS. G. REYNOLDS,
Deputy Clerk, District Court.

EXHIBIT A.

This indenture, made the fifteenth day of February, in the year of our Lord one thousand eight hundred and seventy, between Charles Hendrie and E. B. Hendrie, of the county of Lewis and Clarke, and Territory of Montana, parties of the first part, and W. B. Evarts,
91 of the county of Jefferson, and State of Kentucky, the party of the second part, witnesseth:

That the said parties of the first part, for and in consideration of the sum of fifteen hundred dollars, lawful money of the United States of America to them in hand paid, do grant, bargain, sell, convey, and confirm unto the said party of the second part, and to his heirs and assigns forever, all the following property, situate in the county of Lewis and Clarke, and Territory of Montana, and more particularly described as follows, to wit: A twenty-stamp quartz mill, situated in Oro Fino Gulch, in said county and Territory, being about four hundred yards below the mill of the National Mining and Exploring Company, and known as the Hendrie mill, together with all the machinery, fixtures, and appurtenances belonging to said mill, and the ground upon which the same is situated; the said property and premises hereby mortgaged being the same embraced in the mortgage from Charles Hendrie to Norval Harrison, and recorded in the recorder's office of Lewis and Clarke County, Montana Territory. This conveyance is intended as a mortgage to secure the payment of a promissory note executed by Charles
93 Hendrie and E. B. Hendrie, said note being dated January 26th, A. D. 1870, and payable six months after date, together with interest at the rate of four (4) per cent. per month from maturity until paid, the said note being executed for the sum of seventeen hundred and twenty-five dollars, and these presents shall be void if such payment be made. But in case default be made in the payment of the principal or interest, as above provided, then the said party of the second part, his executors, administrators, and assigns, are hereby empowered to sell the said premises, with all and every of the appurtenances, or any part thereof, in the manner prescribed by law, and out of the money arising from such sale to retain the said principal and interest, together with the costs and charges of making such sale, and the overplus, if any there be, shall be paid by the party making such sale, on demand, to the said parties of the first part, their heirs or assigns.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

CHAS. HENDRIE. [SEAL.]
ED. B. HENDRIE. [SEAL.]

Signed, sealed, and delivered in the presence of—
93 ALEX. M. WOOLFOLK.
MASSENA BULLARD.

TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

On this sixteenth day of February, in the year of our Lord one thousand eight hundred and seventy, personally appeared before me, Mas-

sena Bullard, a notary public in and for said county, Chas. Hendrie and Ed. B. Hendrie, personally known to me to be the same persons described in and who executed the foregoing instrument, and who each of them acknowledged to me that they each of them, respectively, executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[NOTARIAL SEAL.] MASSENA BULLARD.
Notary Public.

Recorded at the request of , Feb'y 17th, A. D. 1870, at 9 o'clock a. m., in book F of mortgages, page 129, Lewis and Clarke County records, M. T.

W. B. MORRISON,
Recorder.

In the district court of the third judicial district of the Territory of Montana, in and for the county of Lewis and Clarke.

94 ANDREW J. DAVIS, PLAINTIFF,
vs.
CHAS. HENDRIE & ED. B. HENDRIE, DEFENDANTS. } Summons.

The people of the Territory of Montana send greeting to the above named defendants:

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the district court of the third judicial district of the Territory of Montana, in and for the county of Lewis & Clarke, and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons, if served within this county, or if served out of this county but in this district, within twenty days, otherwise within forty days, or judgment by default will be taken against you, according to the prayer of said complaint. The said action is brought to recover judgment against said defendants for the sum of seventeen hundred and twenty-five dollars, with interest thereon from the 26th day of July, 1870, at the rate of four per cent. per month, and costs of suit. The said sum being
95 due from said defendants to plaintiff on a certain promissory note set out in the complaint on file herein, and also to obtain a decree of this court foreclosing a certain mortgage made and executed by said defendants to W. B. Evarts, and given to secure the payment of said note; that said premises described in said mortgage be sold and proceeds applied to the payment of said judgment, and for other and further relief. And you are hereby notified that if you fail to appear and answer the said complaint, as above required, the said plaintiff will take default against you and apply to the court for the relief demanded in said complaint.

Given under my hand and the seal of the district court of the third judicial district of the Territory of Montana, in and for the county of Lewis and Clarke, this 23 day of February, in the year of our Lord one thousand eight hundred & seventy-one.

[DISTRICT COURT SEAL.] W. S. SCRIBNER, *Clerk*,
By CHARLES G. REYNOLDS,
Deputy Clerk.

OFFICE OF THE SHERIFF OF THE COUNTY OF LEWIS & CLARKE.

I hereby certify that I received the within summons on the 23d day of February, A. D. 1871, and personally served the same on the
96 23d day of February, A. D. 1871, on Ed. B. Hendrie, being one of the defendants named in said summons, by delivery to Ed. B. Hendrie, said defendant, personally, in the county of Lewis and Clarke, M. T., a copy of said summons, and a certified copy of the complaint in the action named in said summons.

WM. L. STEELE, *Sheriff*,
By WES. ALEXANDER,
Under Sheriff.

Dated this day of A. D. 187 .

I hereby certify that I served the within summons on the 20th day of March, A. D. 1871, on Chas. Hendrie, by showing him the within original and delivering to him a copy thereof in Lewis and Clarke County, M. T.

W. L. STEELE, *Sheriff.*

Filed March 21, 1871.

SCRIBNER, *Clerk—R.*

In the district court of the third judicial district of the Territory of Montana in and for the county of Lewis and Clarke.

ANDREW J. DAVIS, PLAINTIFF,
against
CHAS. HENDRIE & ED. B. HENDRIE, DEFENDANTS.

Decree of foreclosure & sale in open court. A. D. 18 .

97 This cause having this day been brought on to be heard upon the complaint filed therein, taken as confessed by the defendants, Charles Hendrie and Ed. B. Hendrie, (whose default for not answering thereto have been duly entered,) and the court having heard the proofs necessary to enable it to render judgment herein; and it appearing to the court, from facts and pleadings on file in the above cause, that there is now due to the plaintiff from the said defendants, for principal and interest upon the debt and mortgage mentioned and set forth in the complaint, in the sum of three thousand eight hundred and sixty-four dollars, which sum is to draw and bear interest from March 8th, 1873, at the rate of ten per cent. per annum, and that all the allegations in the said plaintiff's complaint contained are true: Now, on motion of Toole & Toole, of counsel for the plaintiff, it is adjudged and decreed that all and singular the mortgaged premises mentioned in the said complaint and hereinafter described, or so much thereof as may be sufficient to raise the amount due to the plaintiff for the principal and interest and costs in the suit and the expenses of sale, and which may be sold separately
98 without material injury to the parties interested, be sold at public auction by or under the direction of the sheriff, master, or commissioner of the county of Lewis and Clarke, where said mortgaged premises are situate; that said sale be made in said county; that the said sheriff, master, or commissioner give public notice of the time and place of such sale according to the course and practice of the court and the law relative to sales of real estate under execution; and that the plaintiff or any of the parties to this suit may become the purchaser at such sale; and that the said sheriff, master, or commissioner, after the

time allowed by law for redemption has expired, execute a deed to the purchaser or purchasers of the mortgaged premises on the said sale; that the said sheriff, out of the proceeds of said sale, retain his fees, disbursements, and commissions on said sale, and pay to the plaintiff, or his attorney, out of said proceeds, costs in this suit, taxed at $, so found due as aforesaid, together with interest thereon, at the rate of ten per cent. per annum, from the date of this decree, or so much thereof as the said proceeds of sale will pay of the same, (and that the
99 said sheriff take receipts for the amount so paid and return the same to this court with his report of sale, and that he bring the surplus money arising from said sale, if any there be, into court, within five days after such surplus shall have been received and shall be ascertained, to abide the further order of this court;) that the defendants, or all persons claiming or to claim from or under them, and all persons having liens subsequent to said mortgage, by judgment or decree, upon the land described in said mortgage, and his or their personal representatives, and all persons having any lien or claim by or under such subsequent judgment or decree, and their heirs or personal representatives, and all persons claiming under them.

And it is further adjudged and decreed that the purchaser or purchasers of said mortgaged premises at such sale be let into possession thereof, and that any of the parties to this action who may be in possession of said premises or any part thereof, and any person who since the commencement of this action has come into possession under them or either of them, deliver possession thereof to such purchaser or purchasers on pro-
100 duction of the sheriff's deed for such premises, or any part thereof.

And it is further adjudged and decreed that if the moneys arising from the said sale shall be insufficient to pay the amount so found due to the plaintiff as above stated, with the interest and costs and expenses of sale as aforesaid, the sheriff specify the amount of such deficiency and balance due to the plaintiff in his return of said sale, and that on the coming in of said return, a judgment of this court shall be docketed for such balance against the defendants Chas. Hendrie and Ed. B. Hendrie, and that the defendant Chas. Hendrie and Ed. B. Hendrie, who are personally liable for the payment of the debt secured by the said mortgage, pay to the said plaintiff the amount of such deficiency and judgment, with interest thereon at the rate of ten per cent. per annum from the date of said last-mentioned return and judgment, and that the plaintiff have execution therefor.

The description and particular boundaries of the property authorized to be sold under and by virtue of this decree, so far as the same can be ascertained from the mortgage above referred to or from the
101 complaint filed in this action, are as follows, to wit: one twenty-stamp quartz-mill, situate in Orofino Gulch, in said county, being about four hundred yards below the mill of the National Mining and Exploring Company, and known as the Hendrie Mills, together with all the machinery and appurtenances belonging to said mill and the ground upon which the same is situated.

D. S. WADE,
Judge Third Judicial District Court,
Lewis and Clarke County, Montana.

The defendant Davis then testified:

"That nothing has been paid upon either of said mortgages and decrees, but that the whole amount of said several mortgages and decrees *are* due and unpaid."

George B. Foote was then called, and testified:

"I was United States deputy surveyor of mineral lands in Montana Territory, and made the survey and platted the property mentioned in the patent and in plaintiff's complaint. The seven hundred feet mentioned in the patent, comprises discovery claim and claim one east, and the west half of two east, and claim five east from discovery, on the Whitlatch Union lode, described in the complaint, and is same property."

102 The cause was, after the foregoing witness had been introduced, taken under advisement by the court, and subsequently the court found as follows, to wit:

ALVORD
vs.
HENDRIE ET AL.

I find that there is due to the plaintiff from the defendant Hendrie, the sum of $3,787.50, with interest thereon from the 25th day of June, 1871; that of this amount $1,893.75 is a valid lien upon the mill, and $1,893.75 is a valid lien upon the mine; that these amounts of money became liens upon said property on the 1st day of August, 1869; that the defendant Davis holds a mortgage upon the mine, which is a valid lien thereon from the 10th day of September, 1868, and is prior to all others in this suit, upon the mine. Defendant Kelly has a valid lien upon the mine for the sum of $235 and interest the , and that it is next in priority to the lien of plaintiff; that the lien second in priority upon the mine is that of plaintiff, Alvord, for the sum of $1,893.75; that the defendant Davis holds a valid mortgage upon the mill, which mortgage was given to Norval Harrison, upon which a decree has been rendered, and that its lien dates from Oct. 2d, 1869,
103 and is next in priority to lien of plaintiff; that defendant Davis holds a mortgage upon the mill, given to T. C. Evarts, on which a decree has been rendered, and that the date of its lien is Jan'y 26th, 1870, and is next in priority to the Harrison mortgage; that defendant Davis holds a mortgage which is a valid lien upon both mine and mill from the 19th day of September, 1870, and is next in priority on the mine to the lien of Kelly, and is next in priority upon the mill to lien of the Evarts mortgage; that plaintiff is entitled to a decree authorizing the sale of said property, and that in case of a sale the decree should provide that the proceeds therefrom be applied in the following manner:

If the mill is sold, the proceeds should be applied—

First. In the payment of lien of plaintiff, amounting to the sum of $1,893.75, and interest from the 25th day of June, 1871;

Second. In payment of the amount due upon the mortgage to Norval Harrison, upon which a decree has been rendered;

Third. In payment of mortgage to Evarts, upon which a decree has been rendered; and

104 Fourth. In payment of amount due to Davis upon mortgage of Sept. 19th, 1870, providing the same is not paid by a sale of the mine.

In case of sale of the mine, the proceeds should be disposed of as follows:

First. In payment of amount due on mortgage of Sept. 10th, 1868.

Second. In payment of amount due plaintiff on his lien of Aug. 1, 1869.

Third. In the payment of amount due on Kelly's lien of Sept. 10th, 1869.

Fourth. In payment of amount due Davis on his mortgage of Sept. 19th, 1870, providing the same is not paid by proceeds of sale of mill.

The decree should provide for personal judgments for each of these amounts, against Hendrie upon the coming in of sheriff's account showing deficiency.

And on the day of March, A. D. 1873, the court made and signed a decree in said cause; which is in words and figures as follows:

In the district court of the third judicial district of the Territory of Montana, in and for the county of Lewis and Clarke, February term, A. D. 1873.

Present, the honorable D. S. Wade, dist. judge.

HARVEY ALVORD, PLAINTIFF, *against* CHARLES HENDRIE, ANDREW J. DAVIS, & Patrick Kelly, defendants. } Judgment and decree of court.

The summons in this case having been regularly served on all of the parties defendant, and the defendant Charles Hendrie having failed to appear and answer within the time prescribed by law, and default having been regularly entered as against him, and the defendants Andrew J. Davis and Patrick Kelly having answered separately to the complaint of the plaintiff, this cause came regularly on for trial on the 13th day of March, A. D. 1873, as between the plaintiffs and the defendants answering; Shober and Lowry appearing as counsel for the plaintiff, and Chumasero & Chadwick as counsel for both of the answering defendants, the cause being tried by the court sitting without a jury.

Wherefore, this cause having come on to be heard as aforesaid
106 upon the amended bill of complaint herein, and separate answers of the defendants Andrew J. Davis and Patrick Kelly thereto, and the replications of the complainant to said separate answers, and the proofs, oral, documentary, and written, taken and plead in the cause, and having been argued by counsel for the respective parties, and the cause being finally submitted to the court for final adjudication and consideration upon the evidence and pleadings, and after due deliberation, the court delivers its findings and orders that judgment and decree be entered in accordance therewith.

Now, therefore, on consideration thereof, and by reason of the law, facts, and findings aforesaid, it is ordered and adjudged that the plaintiff, Harvey Alvord, have and recover of the defendant Charles Hendrie the sum of four thousand five hundred and forty-six dollars, with interest thereon from the date hereof until paid, at the rate of ten per cent. per annum, together with the plaintiff's costs and disbursements in this action, amounting to the sum of dollars.

And it is further ordered, adjudged, and decreed that of the
107 amount of the above indebtedness the sum of 2,217 dollars, and interest thereon from the date hereof, with one-half of the costs of this case, to wit, dollars, in case no other sufficient property belonging to said defendant Charles Hendrie be found to satisfy the same, shall be levied out of said Charles Hendrie's interest in the following-described property, upon which said interest in said property said amounts are hereby adjudged and decreed to be a lien, to wit: The in-

terest of said Charles Hendrie in discovery claim, and claims number one and two east from discovery, on the Union lode number two, situated in Oyhee Park mining district, in Lewis and Clarke County, Montana Territory; each of said claims being and containing two hundred linear feet on said lode, said lode being otherwise known as the Whitlatch Union Quartz Lode. And that all the interest of said Charles Hendrie in all of said premises, or so much thereof as shall be sufficient to pay not only said last-named amount, with interest and costs due and to accrue, to said plaintiff, but also to pay to the defendant, Andrew J.
Davis, the amount due him on a certain mortgage executed by
108 Charles Hendrie, bearing date the 10th day of September, A. D.
1868, or so much thereof as shall then remain unpaid, (said mortgage being hereby adjudged a prior lien to the lien of plaintiff on said property, and the amount thereof being five thousand four hundred dollars,) with interest thereon, or any decree rendered or to be rendered there*from*, be sold at public auction, to the highest bidder, by or under the directions of the sheriff of said county of Lewis and Clarke, being the county in which said property is situated, in the manner and form hereinafter provided. And that upon such sale, the said Andrew J. Davis shall first receive the amount of his said demand, as aforesaid, from the proceeds thereof, after the costs and expenses of sale are paid, and then, should there be any remaining funds from said proceeds of such sale, they shall be applied to the payment of said lien of plaintiff, to wit, 2,272 dollars, with interest, besides said costs and disbursements; and the balance, if any there be, shall be brought into court, to be applied to the payment of such subsequent liens as the court may direct;
and as to such it is hereby ordered, adjudged, and decreed that
109 a certain lien and demand on and against said premises of and
owned by one Patrick Kelly, amounting to 235 dollars, with interest there*from* on and after the 1st day of June, A. D. 1871, shall be paid out of any residue of the proceeds of such sale; and that after said amounts are paid out of said proceeds of the sale of said mine, then, should any funds remain applicable thereto, the same shall be applied to the payment of the mortgage of the defendant Davis, dated the 19th of September, A. D. 1870, amounting to the sum of 11,444 dollars, with interest as therein provided; and that the above-mentioned sums and several liens, mentioned as liens and mortgages, shall be paid and credited upon any judgment or judgments, decree or decrees, obtained, or hereafter to be obtained, in this court thereon.

And it is further ordered, adjudged, and decreed that the sheriff give public notice of the time and place of such sale, according to the course and practice of this court and the laws of this Territory relating to the sale of real property under execution in this Territory, and in all re-
spects conform with such practice and law relating to such sale,
110 and that the plaintiff, or any party to this suit, may become purchaser at such sale.

And it is further ordered, adjudged, and decreed that the defendants, Charles Hendrie and Andrew J. Davis and Patrick Kelly, and all persons claiming or to claim title by lien or claim through or under them, or either of them, to, on, or against said premises, or any part thereof, and all persons whomsoever claiming to hold liens thereon subsequent to the date upon which the lien of the plaintiff attached thereto, to wit, on the first day of August, A. D. 1869, and all persons whomsoever claiming liens by mortgage, lease, decree, or conveyance of any kind whatever accruing subsequent to the time the plaintiff commenced work on said premises, to wit, the 1st day of August, A. D. 1869, and

their several grantors, assignees, and personal representatives; and all persons whomsoever claiming or to claim title thereto or interest therein by, through, or under them, or either of them, be forever barred and foreclosed of and from all right, title, and equity of redemption, and claim of, in, and to said premises, and every part thereof, from and after the delivery of the said sheriff's deed to the purchaser or purchasers under this order of sale.

111 And it is further ordered, adjudged, and decreed that the purchaser or purchasers of said premises at such sale shall be immediately let into the possession of said premises, and that any party to this action hereby foreclosed thereof, or his or their heirs or assigns, who may be in possession, deliver possession thereof to the purchaser or purchasers thereof immediately on such sale and delivery o f such sheriff's deed aforesaid.

And it is further ordered, adjudged, and decreed that of the amount of the first-mentioned indebtedness one-half thereof, that is to say, the sum of 2,217 dollars, together with interest thereon from and after the date hereof, with one-half of the costs of this cause, to wit, the sum of dollars, in case no other sufficient property of the said Charles Hendrie (defendant) shall be found to satisfy the same, shall be levied out of the following-described property, upon which property said amounts are hereby declared and adjudged to be a lien, to wit: said Charles Hendrie's interest in a twenty-stamp quartz-mill and buildings, known as the Discovery Mill, situated in Oro Fino Gulch, about one-quarter of a mile below Unionville, in the county of Lewis and Clarke, in the Territory of Montana, which was built by Charles Hen-

112 drie in the years 1869 and 1870, (A. D.,) and by him used as a mill for reducing and crushing quartz-rock, together with all of the machinery, fixtures, appliances, apparatus, and rigging thereunto belonging, *or belonging*, together with the messuage, and that all of said premises and property, or so much thereof as shall be sufficient to pay said last-named indebtedness and demand of plaintiff's, with costs and expenses of sale, together with the hereinafter-mentioned subsequent liens of the defendant, Andrew J. Davis, be sold at public auction, to the highest bidder, by or under direction of the sheriff of the county of Lewis and Clarke, of the Territory of Montana, the same being the county in which said property is situated, in the manner and form hereinafter provided; and that such sheriff give public notice of the time and place of such sale, according to the course and practice of this court and the law relating to sales of real estate in this Territory under execution, and in all respects conform with such practice and law, and that the sheriff, out of the proceeds of such sale, retain the amount of his lawful fees and commissions, and of the balance of said moneys so arising from such sale, the plaintiff, Harvey Alvord,

113 the amount that shall then be due and unpaid on said indebtedness hereinbefore declared to be a lien upon said premises, to wit, 2,217 dollars, with interest and costs as aforesaid; and out of any moneys remaining after such payment shall be made, the same, or so much thereof as shall be necessary, shall be applied to the satisfaction of a mortgage or judgment or decree thereon in favor of the defendant, Andrew J. Davis, which mortgage bears date the 2d day of October, 1869, assigned to A. J. Davis, and decree of foreclosure thereon entered in this court at the February term, 1873, to the amount of 8,755.50 dollars, besides interest and costs. And should any moneys remain thereafter, then the balance, or so much thereof as shall be necessary, shall be applied to the payment of a mortgage debt and decree rendered

thereon in this court, said mortgage executed by Charles & E. B. Hendrie, dated February 15th, 1870, to one U. B. Evarts, and assigned to defendant, Andrew J. Davis, and decree of this court rendered thereon, decreeing sale, due thereon, 3,864 dollars, besides interest and costs. Decree ordered thereon at February term, 1873.
114 And should any moneys remain after said demands are paid, then the balance, or so much thereof as shall be necessary, shall be applied to the payment of any portion of a certain mortgage, dated September 19th, 1870, hereinbefore mentioned as a lien on the mine hereinbefore described, that shall remain due and unpaid after the sale of said mining property and proceeds applicable thereto are applied to the payment of said mortgage debt.

And it is further ordered, adjudged, and decreed that the defendants, Andrew J. Davis, Chas. Hendrie, and Patrick Kelly, and each of them, and all persons whomsoever having, holding, or claiming liens on said premises for labor or materials done or furnished subsequent to the filing of the lien of plaintiff thereon, to wit, the 26th day of June, A. D. 1871, and all persons whomsoever having liens on said premises by mortgage, lease, decree, or conveyance from said Charles Hendrie, or those claiming under him, subsequent to the time the lien of this plaintiff attached thereto, which time it is hereby adjudged and decreed to have been on the 1st day of August, A. D. 1869, and their sev-
115 eral grantors, assigns, and personal representatives claiming or to claim title thereto or interest thereon, by, through, or under them, or either of them, be forever barred and foreclosed of and from all equity of redemption, claim, demand, right, and title or interest of, in, and to said premises, and every part and parcel thereof, from and after the date of the delivery of the sheriff's deed to the purchaser or purchasers thereof under this order of sale.

And it is further ordered and decreed that the purchaser or purchasers at such sale shall be immediately let into the possession of said premises, and that party to this action hereby foreclosed thereof, his or their heirs or assigns, who may be in possession, deliver possession thereof immediately on sale and delivery of said sheriff's deed therefor, or such portions thereof as shall be chattel-property, immediately upon such sale.

And it is further ordered and decreed that the present sheriff of the county of Lewis and Clarke aforesaid, during his term of office, and his successor or successors in office, during the terms thereof, and while the same shall remain in and hold said office, shall be deemed special masters in chancery for the purposes of making the sales provid-
116 ed for hereinbefore, and shall have and possess all of the powers of a master for the said purposes. And that plaintiff have judgment against defendant Charles Hendrie for any amount of said indebtedness not paid under this decree.

Mch. 22, 1873.

D. S. WADE, *Judge.*

To the rendering of which decree, and to the giving and decreeing priority to the liens of said plaintiff over the liens of said defendant Davis, in said cause, the said defendant Davis, by his attorneys, then and there excepted, and asks that this bill of exceptions be signed by the judge of this court; which is done this 22nd day of March, 1873.

D. S. WADE, *Judge.*

And on the 30th day of May, A. D. 1873, the defendant Andrew J. Davis filed herein his notice of appeal; which is in words and figures following, to wit:

In the district court of the third judicial district in and for the county of Lewis and Clarke, M. T.

HARVEY ALVORD, PLAINTIFF,
against
CHAS. HENDRIE ET AL., DEFENDANTS. } Notice of appeal.

117 You will please take notice that the defendant A. J. Davis, in the above-entitled action, hereby appeals to the supreme court of the Territory of Montana from the judgment and decree therein made and entered in the said district court on the 22d day of March, A. D. 1873, in favor of said Alvord and against said defendant Davis, and from the whole of said judgment and decree.

Dated May 30th, 1873.

Yours, &c.,

CHUMASERO & CHADWICK,
Attorneys for Appellant.

To the clerk of said district court, and Shober and Lowry, esqrs., attorneys for respondents.

And on the 31st day of May, A. D. 1873, the defendant A. J. Davis filed herein his bond on appeal; which is in words and figures following, to wit:

In third judicial district court, Lewis & Clarke County, Montana Territory.

H. ALVORD
vs.
CHARLES HENDRIE ET AL. } Bond on appeal.

118 Whereas the defendant A. J. Davis, in the above-entitled action, is about to appeal to the supreme court of the Territory of Montana from the judgment and decree entered against him in said action in the said district court, in favor of said plaintiff, on the 22d day of March, A. D. 1873, giving priority to the demand of said plaintiff against said Charles Hendrie over that of said Davis:

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, John McCormick and S. M. Hall, of the county of Lewis and Clarke, do hereby jointly and severally undertake and promise, on the part of the appellant, that the said appellant will pay all damages and costs which may be awarded against him on the appeal, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound. And whereas the said appellant is desirous of staying the sale of the premises in said judgment and decree mentioned and described, and the court having fixed the amount of the undertaking to be given by appellant on such stay of exe-
119 cution, we do further, in consideration thereof and of the premises, jointly and severally undertake and promise, and acknowledge ourselves further jointly and severally bound in the further sum of five hundred dollars, (being the amount for that purpose fixed by the judge of this court,) that during the possession of such property by the appellant he will not commit or suffer to be committed any waste there-

on, and that if the said decree appealed from be affirmed, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof, not exceeding the said sum of five hundred dollars as aforesaid, fixed by the judge of this court, by which the said judgment and decree was rendered.

Dated this 30th day of May, A. D. 1873.

JOHN McCORMICK. [SEAL.]
S. M. HALL. [SEAL.]

TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

John McCormick and S. M. Hall, the persons named in and who subscribed the foregoing undertaking, and the sureties thereto, being
120 severally duly sworn, each for himself says that he is worth the several amounts specified in said undertaking as the penalties thereof over and above all his just debts and liabilities, exclusive of property exempt from execution.

JOHN McCORMICK.
S. M. HALL.

Subscribed & sworn to before me this 30th day of May, 1873.

WILLIAM CHUMASERO,
Notary Public.

TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

I, A. H. Beattie, clerk of the district court, third judicial district, in and for the county & Territory aforesaid, do hereby certify that the foregoing ninety-nine (99) pages, numbered from one (1) to ninety-nine, (99,) contain a full, true, and correct transcript of certain proceedings, orders, and pleadings had, made, and filed in said district court in the case of Harvey Alvord against Chas. Hendrie, Andrew J. Davis, and Patrick Kelly.

Witness my hand and the seal of said district court this fourth (4) day of August, 1873.

[SEAL DIST. COURT.] ALEX. H. BEATTIE, *Clerk.*

121 In the supreme court, Territory of Montana, August term, A. D. 1873.

HARVEY ALVORD, RESPONDENT,
vs.
CHARLES HENDRIE, ANDREW J. DAVIS, AND Patrick Kelly, appellants.

On the eleventh day of August, in the year of our Lord one thousand eight hundred and seventy-three, came the appellant Andrew J. Davis, by his attorneys of record, Messrs. Chumasero & Chadwick, and files in the above-entitled cause a transcript of the record in said action of the district court of the third judicial district of the Territory of Montana, in and for the county of Lewis and Clarke, of which said record, in words and figures, the foregoing one hundred and twenty pages, numbered from one to one hundred and twenty, inclusive, contain a full, true, and correct copy, as the same is of file in the office of the clerk of said supreme court.

122 And afterwards, to wit, on the 12th day of August, A. D. 1873, comes the said appellant A. J. Davis and files in said cause his brief; of which, in words and figures, the following is a copy, to wit:

In supreme court, M. T.

HARVEY ALVORD
vs.
CHAS. HENDRIE ET AL. } Appeal by Davis, defendant.

The defendant Davis appeals from the decree made and entered in the court below, giving priority to the claim of the plaintiff against Charles Hendrie, one of the defendants, over the claim of Davis under the mechanics-lien law of this Territory, for the reason that, as claimed by appellant, no decree could be properly rendered in the case in favor of the plaintiff against the property sought to be charged.

1st. The 9th section of the act, page 511, of the lien law, subjects property to the extent, and "only" to the extent, of the right, title, and interest of the owner or proprietor. The words "owner or proprietor" are synonimous terms, and mean "the person who has the legal right or exclusive title to anything" (Bouvier Law Dict., "Owner," 268.) The only words of extension in the act are to a "leasehold interest."

123 The proofs show conclusively that Hendrie was not the owner or proprietor. They fail to show that he had any leasehold interest or any other interest. We contend that a court of equity will not decree a sale of premises unless it affirmatively appears and it is shown that a defendant has an interest which can be sold, and which is a charge of some kind upon the premises. It will not lend itself by its decree to cloud the title of another, not a party to the proceedings. The complaint alleges ownership in Hendrie. The allegation is material, and should have been proven. (Page 2 of record.) The proof shows that the allegation was untrue, and affirmatively shows that he was not the owner. (Record, pp. 34, 67, 84.) Where the law provides for the acquiring of a possessory title to land, it is incumbent, we claim, on one who seeks to enforce a lien to show that the requirements of that law have been complied with, viz: to show discovery and location and pre-emption of quartz claims, and conveyance by the pre-emptor to one claiming under him. This was not done. A conveyance by one shown not to have the title, proves nothing.

124 2. The complaint is utterly insufficient. It shows upon its face, and it is set up in the answer, that the court had no jurisdiction either as a court of law or equity. From the complaint it cannot be ascertained whether the case is one of law or equity. It must be treated as either one or the other, and it was not for the court below to choose which branch of jurisdiction it would exercise.

3. If the complaint is treated as in equity, it is multifarious, and asks for that which the court had not authority to grant by way of relief. It sets up two distinct causes of action, claiming a general personal judgment for one amount of indebtedness, and then asks that one-half be declared a specific lien upon one piece of property, and that the other half be declared a lien upon another entirely distinct piece, and that the whole property be sold to pay the general sum claimed to be due, (pages 5 & 6 of record.) (Houck on Liens, 139; 5 Allen, 403 & 408.)

4. The evidence of Alvord is to the effect that in August, 1869,

125 he was hired (Rec., p. 49) by the year, at $2,500.00 a year, and was to devote his time equally to each piece (Rec., page 27) of property—half to the mill and half to the mine. We claim that this

was a contract for one year, and ending with the year; and that if there was any right under the statute to a lien, that right expired sixty days after the end of the year, unless notice of lien was filed and suit brought as required by law. (Sections 6 & 20.) This was not done. Then up to August, 1870, there cannot be, as we contend, any legal claim to have the work claimed to have been done prior to that time declared a lien.

5. The evidence shows that all the work testified to as having been done by plaintiff, in erecting hoisting-works, whim, engine-house, and making track and car, was done before the close of the summer of 1870. There is no evidence to show that plaintiff did any work, either on mill or mine, since that time, which would or could be the parent of a lien under the statutes. The fact that plaintiff was engaged by the year would not be sufficient, but there must be evidence from which
126 the court can definitely see that he not only worked, but that the work was of such a character and done in such a place or places or on account of such matter as, under the statute, would authorize and justify the claim for a lien.

6. In this case other parties are claiming statutory and specific liens upon the two pieces of property described in the complaint; some on one piece and some on both. Regard should have been paid to their rights. How can the court ascertain from the evidence what of plaintiff's work was properly chargeable (if at all) to one piece of property and what to the other? The onus was on the plaintiff. It was for him to establish a definite contract as to each, and to prove a definite amount of labor performed on each. (Houck, 139; Stat., sec. 1, p. 509. Record, page 50.) The statute only gives a lien upon that property upon which the work is actually done. What work was done on the mine; what on the mill? If there is any right to a lien, the answers to these questions determines its extent, for only to the extent of the work actually done on each could a lien extend and prevail. (Sec. 17 Mo., 271.)

127 7. An overstatement of the amount claimed to be a lien would render a claim of lien void. This, we contend, was the case in Alvord's notice. (3 Allen, 569; 6 Gray, 532; Houck, sec. 210.)

8. No lien can attach for mere trivial repairs. (Houck, sec. 165.) The mill was completed by the summer of 1870. (Record, p. 27–34.) The evidence shows that nothing of any consequence was done in the way of repairing or otherwise since putting in a set of iron guides in the summer of 1870. The plaintiff himself in evidence was unable to specify a single thing which he did after that time. The language of the statute must govern. Courts should not extend it to cases not provided for. (24 Illinois, 112; Houck, sec'. 70, 71, 73.) The statute must be strictly complied with. (2 Cal., 19; 31 Cal., 234.) The equity of a lien arises from the fact that the labor done or materials used have increased the value of the thing upon which it has been bestowed, and for which they have been used. The agreement that half of plaintiff's
128 pay should come from the mill and half from the mine would not create a statutory lien on the property to that extent. The work must have been done on or for the property sought to be charged, and to the extent only of the value actually performed. Could any lien accrue, especially when, as in this case, it is proven that during a portion of the time the plaintiff was engaged elsewhere, and in cleaning up and amalgamating in the mill, for which labor no lien is given by statute?

All of Davis' claims, we contend, were prior in point of time to any claim of plaintiff, certainly to any claim accruing during the first year of his employment by Hendrie, and also to the claim accruing

subsequently to that time; for they were in existance before the commencement of the second year of plaintiff's employment, and before any notice of lien was or could have been filed by plaintiff.

CHUMASERO & CHADWICK,
Attorneys for Appellant.

Filed August 12th, 1873.

J. R. ALDEN, *Clerk.*

And on the same day, to wit, the 12th day of August, A. D. 1873, came the said respondent, Harvey Alvord, by his attorneys,
129 Shober & Lowry, and filed his brief, points, and authorities in said cause on appeal; of which in words & figures the following is a copy, to wit:

In supreme court, Territory of Montana, August term thereof, anno Domini 1873.

HARVEY ALVORD
vs.
CHARLES HENDRIE, A. J. DAVIS, ET AL.

This appeal is taken by A. J. Davis, neither of the other defendants appealing.

1. Davis appeals from the decree of the court below, decreeing Alvord a prior lien on the mill for one-half the amount found due him from Charles Hendrie per contract, as per lien filed.

2. From the decree of the court below, decreeing Alvord a lien upon Hendrie's interest in the mine for half the amount found due Alvord from Charles Hendrie.

3. The evidence shows that Alvord, as a mechanic, erected the mill, and did the mechanical work on the mine, and that per contract with Hendrie, the owner of the mill so erected, and having an interest in the mine, the said Alvord was to put in half of his time in working
130 on the mill and half in working on the mine, and that he did perform the contract in such way.

4. That he filed his lien in accordance with the statutes of the Territory of Montana, claiming a lien for what labor he performed on the mill against the mill, and for what labor he did upon the mine against the mine; that said liens were filed within less than sixty days from the completion of the work on the mill and mine; that suit was commenced to foreclose said liens within less than six months from the filing of said liens. As to the law of the Territory governing liens, see Bannack Statutes, pages 332 and 334, sections 1 and 8; also laws of 1867, page 80, section 1, the same being embodied in the present statute. Mechanics' and laborers' liens attach from the time of the commencement of the building, and have priority over all encumbrances made thereafter. (Montana Statutes of 1864, page 334, sec. 8; 21 Missouri, 214; Mason & Duke vs. Germain, 1 Montana, Aug. term, 1870, and Mochon vs. Sullivan, 1 Montana, 1871.) Liens attach as soon as building is begun. (Houck on Liens, page 163.) A mortgagee must examine the
131 premises and see that they are free from encumbrances of mechanics and material-men, and then must wait a certain limited time. (Houck on Liens, page 67, sec. 50.) Mechanics' liens superior to all liens subsequent to the commencement of the building. (Houck on Liens, page 141, sec. 141.) Courts favor mechanics, and liberally

construe the law in favor of them. (Houck on Liens, page 80, sections 66 and 68.) The same law of liens is applicable to mechanics and laborers working on mines. (See Laws of 1867 and 1868, page 80, section 1; Nowlan vs. Harding et al., decided by supreme court of Montana Territory August term, A. D. 1870.) The appellate court will presume in favor of the court below, unless the record clearly shows error, which this record does not. (2 Cal., 100 & 148; 5 Cal., 151; 7 Cal., 297; 10 Cal., 50.)

SHOBER & LOWRY & G. G. SYMES,
Respt.'s Attorneys.

Filed Aug. 12th, 1873.

J. R. ALDEN, *Clerk.*

And afterwards, to wit, on the 13th day of August A. D. 1873, that being one of the term-days of the said August term of said su-
132 preme court, this cause came on to be heard before said court, on the said transcript of record, and was argued by counsel, and duly submitted; whereupon the court took the same under advisement.

And afterwards, to wit, at the January term, A. D. 1874, of said supreme court, and on the eighth day of January, 1874, the said cause came regularly on therein for decision and judgment on appeal; whereupon the court delivered its opinion in writing in said cause, of which in words and figures the following is a copy, to wit:

Supreme court, Montana Territory, August term, 1873.

HARVEY ALVORD, RESPONDENT,
vs.
CHARLES HENDRIE, ANDREW J. DAVIS, & Patrick Kelly, appellants.
} Appeal from Lewis and Clarke County.

Opinion of court by SERVIS, J.:

This was an action commenced under the mechanics' lien law
133 of Montana Territory to enforce a lien for work and labor alleged to have been performed by the plaintiff, Alvord, for the defendant Hendrie upon a certain quartz-mine and quartz-mill. The allegations of the pleadings in the case are, in substance, as follows: That on the 1st day of August, 1869, the plaintiff, Alvord, entered into a contract with the defendant Hendrie whereby the plaintiff, being a mechanic, agreed to work for the defendant for the sum of $2,500 per annum, in and about the opening and developing of a certain quartz-mine, of which the said defendant was the owner of thirteen-twentieths, known as the Whitlatch Union quartz-mine or lode, situate in Lewis and Clarke County, Montana Territory, and in and about the building, erection, and repairing of buildings and machinery upon the premises, known as a twenty-stamp quartz-mill, in Oro Fino Gulch, a short distance from said mine, all being more fully described in said pleadings as being owned by said Hendrie—one-half of the time of the plaintiff to be devoted to each of said work'. That he commenced said work
134 on the said 1st day of August, 1869, and so worked continuously thereafter until the 1st day of May, 1871. That on the 25th day of June, 1871, he settled with Hendrie, and an account therefor was stated between them, when there was found due plaintiff from said Hendrie, after deducting sundry credits and payments, the sum of $3,787.50, which it was agreed between them should be a lien upon the mine and quartz-mill in equal proportions. That on

the 26th day of June, 1871, he perfected the two separate liens upon said property, according to law; and by way of two separate cause' of action in this proceeding seeks to enforce the same, alleging therein that the defendants Kelly and Davis claim to have some interest or lien upon said property, who appear and answer separately. Kelly, for answer, substantially denies the allegations of the plaintiff's complaint, averring the transaction between Alvord and Hendrie to be fraudulent and void; that the court had no jurisdiction over the subject of the action, and could not render a judgment in personam and in rem in the same proceeding; and, by way of cross-demand, claims a prior lien on said Whitlatch lode, for work and labor, to the amount of $235, to recover which he then had suit pending, and prayed judgment of
135 dismissal. Davis answered, denying substantially as did Kelly, and averring his interest in the property, viz, that of two mortgages executed by Hendrie, one of date of September 17th, 1870, given to secure two promissory notes, one for $2,000, dated July 15th, 1860, the other dated June 7th, 1869, for $9,444, payable in six months; the other mortgage, dated September 10th, 1868, to secure $5,400. Also a mortgage executed by Hendrie to Norval Harrison, October 2, 1869, to secure the payment of $4,490; also another mortgage executed by said Hendrie and one E. B. Hendrie to W. B. Evarts, to secure $1,725; which last mortgages had been duly assigned to Davis, and suits were then pending to foreclose the same. Upon these pleadings, including plaintiff's replication, the parties proceeded to trial to the court. The plaintiff, to maintain the issue on his part, offered evidence and proofs, amongst which were the recorded notices required by the lien-law; conveyance from J. W. Whitlach to Charles Hendrie; articles of agreement between Whitlatch, Tutt, and others; also record of other deeds and mortgages; to all of which the defendant Davis objected, which was over-
136 ruled and excepted to. And plaintiff rested.

The defendant Davis, alone, introduced evidence to maintain the issue on his part, and rested.

The court below made the following finding, viz: That there is due plaintiff from defendant Hendrie the sum of $3,787.50, with interest from June 25th, 1871. That of this amount, $1,893.75 is a valid lien upon the mill and $1,893.75 is a valid lien upon the mine; that the same became such liens on the 1st day of August, 1869. That the defendant Davis' mortgage of September 10th, 1868, is a prior lien upon the mine; that defendant Kelly has a lien upon the mine for the sum of $235, with interest, next in priority to that of plaintiff; that the lien second in priority upon the mine is that of plaintiff, for $1,893.75; that the defendant Davis, by virtue of the Harrison mortgage, has a lien upon the mill next in priority to plaintiff, and that his lien thereon, by virtue of the Evarts mortgage, is next in priority; that said Davis also has a valid lien upon the mill by virtue of his mortgage of date of September 19th, 1870, and is next in priority to the lien of Kelly and next in priority to the Evarts mortgage, and rendered its decree ac-
137 cordingly, and for the sale of defendant Hendrie's interest in the property in question for the payment in the order of priority so found by the court. To all of which the defendant Davis excepted, and duly appeals to this court, claiming, as ground for reversal, that under the pleadings in this case the court had no jurisdiction over the subject of the action; that it could not be ascertained therefrom whether the action was one at law or in equity; that if it was one in equity, the relief sought by way of personal judgment and a decree for the sale of the incumbered property, to satisfy the respective liens, could not be

granted; that the evidence did not warrant the findings of the court, and especially as to the ownership of the property by Hendrie, the amount of labor performed upon each species of property, and that the court erred in giving priority to plaintiff over appellant. This proceeding was commenced under and pursuant to the mechanics' lien law, passed by the legislative assembly of this Territory in 1864, amended in 1868, and re-enacted in the codified laws in January, 1872, and is
138 purely and expressly a statutory proceeding; under this law it is provided, that every person who shall perform work upon or provide materials, machinery, or fixtures for any building, erection, bridge, flume, canal, ditch, mining-claim, quartz-lode, ranch, city or town lots, or other improvement upon land, or for repairing the same, upon complying with the provisions of the act shall have for the same a lien thereon to secure the payment for the same, to the extent of all the right, title, or interest owned therein by the owner or proprietor of the same; and such lien shall have preference upon the structure, &c., over any prior lien or mortgage on the land where the same is erected. And that the act further provides the mode of proceeding to enforce the same. That the proceeding shall be commenced in the district court; that the pleadings, practice, process, and other proceedings shall be as in ordinary civil actions, except that the petition (complaint) shall allege facts necessary to secure a lien—shall describe the property charged therewith; and all persons interested in the property may be
139 made parties to the action. The court shall then ascertain, by a fair trial, in the usual way, the amount of indebtedness for which the lien is established, and render judgment for the same, and for costs of suit; and if the property is insufficient to pay the same, then the residue be collected as upon ordinary executions.

All the proceedings in this case having, as we think, sufficiently conformed to the provisions of this act, the question of the jurisdiction of the court in the premises depends upon the right of the legislative assembly so to enact. We are of the opinion that this was a rightful subject of legislation; that by it no jurisdiction was taken from the court inhibited by the organic act of this Territory. The security or lien created by it was, it is true, in derogation of the common law, but similar to that of nearly all of the States and Territories of the United States, and always recognized as a rightful subject of legislation. The kind or character of jurisdiction provided for the enforcement of the lien was that of chancery. The chancery side of the court was appealed
140 to. Without it, the appellant would not have been a proper party to the proceeding, and his rights, as well as the rights of the plaintiff and others, might have been prejudiced; and we are unable to see wherein the rights of any of the parties here *or* could have been prejudiced by reason of the jurisdiction taken or in the mode of the proceedings had in this case. It is, however, claimed by appellants that the evidence, as shown by the record, did not warrant the findings and conclusions of the court below as to the ownership of the property by Hendrie, as to the amount of labor performed on the mill, and on the mine in question; and that the lien of plaintiff was not perfected according to law in that the notices of lien were not filed within sixty days from and after the end of the first year of work by plaintiff. We have examined the evidence presented by the record in this case, and have no difficulty in finding that the evidence was sufficient to establish the ownership of the property in question, as claimed, in the defend-
141 ant Hendrie. It does not appear that any other person has or claims any other or greater interest, except it be the answering

defendants who claim under and from the same character and title. If any doubt existed as to this finding of ownership, we think a reference to the 21st section of the act herein alluded to would at once settle the doubt, for it is therein provided, "Every person, including all cestui que trusts for whose immediate use, enjoyment, or benefit any building, erection, or improvement shall be made, shall be included by the word 'owner' or 'proprietor' under this act, not excepting such as may be miners over the age of eighteen years or married women." In relation to the sufficiency of the proof as to the amount and character of the work performed generally by the plaintiff, and of the amount and character performed upon each of the kinds of property, we are of the opinion that the proof shows that the plaintiff fully complied with the terms of his contract with Hendrie. It is true, the evidence shows that he performed some small amount of work that might not be the subject
142 of a lien under the statute, such as amalgamating; but to what amount it is not shown, and we may well infer from the proof that it did not exceed the amount that had been paid him before filing his lien. There is also proof tending to show that the plaintiff did not and could not, from the character of the business, have worked all the time for which he has charged. All this may be in fact true; but how does that deprive him of a lien for the amount (value) of work done and performed? No proof was introduced even tending to show that what work the plaintiff in fact did do was not worth at the rate of $2,500 per year; and when the plaintiff ceased working, he settled with Hendrie for the same, stating an account as it existed between them, finding a balance due plaintiff of $3,787.50. And there was not shown to have been any fraud or collusion between plaintiff and Hendrie; and although their agreement then apportioning the lien equally upon the mill and the mine could not make the same so in law, no more could such an agreement defeat the law. The contract between the parties was that
143 the plaintiff was to work for the (plaintiff) defendant at $2,500 per annum, one-half the time on the mill, the other half on the mine. Exactly how this time was to be divided is not stated or shown. Neither is it shown that the exact amount and value of labor was not in fact performed as apportioned by the court below upon each species of property; and however material or immaterial the failure to establish these things may be, we are of the opinion that under the contract between the plaintiff and Hendrie and the facts as shown as to the labor performed, that the whole amount thereof, as found due by their settlement, was in law a valid lien upon all the property, both mine and mill property, of which the defendant had interest in; and although he proceeded to enforce the same as upon two seperate causes of action joined in one action, yet, nevertheless, it was in law but one transaction, under one and the same contract, undivided and indivisible, and therefore constituted but one cause of action; and the separating them into two liens and two causes of action joined in one is not erroneous, es-
144 pecially as no objection was taken by demurrer, motion, or otherwise, either before or on the trial. It is also objected that because the plaintiff did not perfect his lien within sixty days from the end of the first year of labor that the same is thereby lost for that year. Our statute creating or giving this kind of lien is unlike any other statute we are acquainted with except that of California, Idaho, and Arizona. Ours and theirs do not make it necessary that any contract should exist for the performance of the labor, &c., in order to entitle the party to a lien for such labor, &c. It simply provides that every person who shall do and perform labor upon any property of another by complying with the

conditions therein specified shall have a lien, &c. Nowhere in the whole act is there any reference to a contract between the parties. Now, the conditions specified to be complied with are, that within sixty days from the time the work shall have been performed, the party claiming such lien shall do certain things, viz, file and account, &c., with the county recorder. These things we find were duly done by the plaintiff in this case.

But if we were in doubt as to this, we need but look to the whole of
145 the facts in the case. The contract between the parties was that the plaintiff was to work upon these two kinds of *of* property for the consideration of $2,500 per annum, i. e., by the year, or at that rate per year; not for one year; the time was indefinite. It might extend to many years, and, indeed, from the character and nature of the business, we might well infer that it might extend to many years, if they could agree. At all events, there was no new contract made at the end of the first year, but the work continued until the 1st day of May, 1871, when it ceased, and was then settled for as of one continuous contract, and that, too, without difference or dispute, or fraud proven. The decree rendered in this case may have gone further than it ought. Indeed, we cannot well see how, under the present law, it could have gone so far as to foreclose the rights of persons not parties to the suit, although under some statutes such authority seems to be given. Yet we are unable to find wherein the court has transcended its jurisdiction or power to the detriment or injury of this appellant; and, indeed, the court gave the appellant relief that might well have been refused under his
146 pleadings and prayer for relief.

The judgment and decree of the court below is therefore affirmed, with costs of this appeal to be taxed to appellant.

D. S. WADE,
Chief-Justice.
HIRAM KNOWLES,
Asso. Justice.
F. G. SERVIS,
Asso. Justice.

Filed & entered Jan'y 8th, 1874.

J. R. ALDEN, *Clerk.*

And afterwards, to wit, on the same day, to wit, the eighth day of January, in the year of our Lord one thousand eight hundred and seventy-four, a judgment on appeal in the foregoing-entitled cause was duly entered, in accordance with the foregoing opinion, in words and figures following, to wit:

HARVEY ALVORD, PLAINTIFF & RESPONDENT,
vs.
CHARLES HENDRIE, ANDREW J. DAVIS, & Patrick Kelly, defts. and appellants. } Judgment on appeal.

147 Whereas in the present term of January, in the year of our Lord one thousand eight hundred and seventy-four, the above-entitled cause came on for decision and judgment on appeal, before the said supreme court, (the errors assigned thereon having been argued and duly submitted at the August term of this court, 1873)—

On consideration whereof, and of the law in the case, it is now here ordered and adjudged by this court that the judgment and decree of the said district court in said cause be, and the same is hereby, affirmed with

costs to be taxed to the appellant. And it is hereby further ordered and adjudged by this court that the said respondent, Harvey Alvord, recover against the said appellant Andrew J. Davis dollars, for his costs in this behalf expended and have execution therefor.

JANY. 8TH, 1874.

And thereupon and therefrom the appellant Davis, by Chumasero & Chadwick, his attorneys, prays an appeal to the Supreme Court of the United States from the said judgment, and asks the court to fix
148 the amount of bond on appeal, and grant a stay of proceedings herein for the term of sixty days from the date of entry of said judgment on appeal.

On consideration, it is ordered and adjudged that the motion by appellants for an appeal herein to the Supreme Court of the United States be, and the same is hereby, sustained; and that an order be entered in said cause fixing the amount of the bond to be given in said cause on such appeal, and for a supercedeas at $1,000; and that the said appellant have sixty days from the date of entry of said judgment to perfect his said appeal.

And afterwards, to wit, on the 10th day of March, A. D. 1874, the said appellant Andrew J. Davis filed herein his undertaking on appeal to the Supreme Court of the United States, of which, in words and figures, the following is a copy, to wit:

Know all men by these presents that we, A. J. Davis, as principal, and John McCormick and S. M. Hall, all of the county of Lewis and Clarke, Montana Territory, are held and firmly bound unto Harvey Alvord in the just and full sum of one thousand dollars to be paid
149 to said Alvord, his certain attorney, executors, administrators, and assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators jointly and severally by these presents, sealed with our seals and dated March 7th, 1874.

Whereas lately, at a term of the supreme court of the Territory of Montana, between said Harvey Alvord and A. J. Davis, Charles Hendrie, and Patrick Kelly, judgment was rendered against the said A. J. Davis, and the said A. J. Davis having obtained an allowance of an appeal in open court to remove the said cause to the Supreme Court of the United States:

Now, the condition of this obligation is such that if the said A. J. Davis shall prosecute his appeal to effect, and shall answer all damages and costs if he fail to make his plea good, and that he will not during the possession of the property described in the decree in this cause by him, commit or suffer to be committed any waste thereon.

A. J. DAVIS. [SEAL.]
JOHN McCORMICK. [SEAL.]
S. M. HALL. [SEAL.]

Sealed & delivered in the presence of—

Approved by—

D. S. WADE,
150 *Chief-Justice Supreme Court, M. T.*

Filed March 10th, 1874.

J. R. ALDEN, *Clerk.*

151 In the supreme court, Territory of Montana.

I, J. R. Alden, clerk of the supreme court of the Territory of Montana, do hereby certify that the foregoing one hundred and fifty pages, numbered from one to one hundred and fifty inclusive, contain a full, true, & correct copy or transcript of all the proceedings had and done in the cause between Harvey Alvord, plaintiff and respondent, & Charles Hendrie, A. J. Davis, and Patrick Kelly, defendants, and A. J. Davis, appellant, as the same appears of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court, at Virginia City, in said Territory, the 26th day of September, A. D. 1874.

[SEAL.] J. R. ALDEN, *Clerk.*

(Indorsement on cover:) No. 217. Andrew J. Davis, appellant, vs. Harvey Alvord. Montana Terr'y sup. court. Filed 29th October, 1874.

Supreme Court of the United States.

No. 217.

ANDREW J. DAVIS, APPELLANT,

vs.

HARVEY ALVORD.

Appeal from the Supreme Court of the Territory of Montana.

APPELLANT'S BRIEF.

R. T. MERRICK,
M. F. MORRIS,
For Appellant Andrew J. Davis.

Judd & Detweiler, Printers.

Supreme Court of the United States.

No. 217.

ANDREW J. DAVIS, APPELLANT,

vs.

HARVEY ALVORD.

Appeal from the Supreme Court of the Territory of Montana.

BRIEF FOR APPELLANT.

Abstract of Pleadings and Proofs.

Harvey Alvord, the defendant in error, on the 26th of February, A. D. 1872, filed his Bill of Complaint in the district court of the third judicial district of Montana, alleging that, under a contract with one Charles Hendrie, claiming to be the owner of a mine and mill in the county of Lewis and Clarke, in that Territory, he had performed work and labor on such mine and mill in equal proportions from August 1, A. D. 1869, to May 1, A. D. 1871, at the rate of $2,500 a year, on account of which he had received $580; that he had performed the work and labor as agreed upon by him; that on June 25, A. D. 1871, he had an accounting with Hendrie, at which it was agreed between them that there was due from Hendrie to Alvord the sum of $1,893.75 on account of the work on the mine and the same amount on account of the work on the mill, or $3,787.50 in all; that, on June 26, A. D. 1871, claimed to have been within

60 days after the last of the work and labor had been done, Alvord filed a notice of lien, in accordance with the territorial law; and that his suit was commenced within six months after the filing of the notice of lien, as required by the same law. It was alleged further, that Hendrie was the owner of the mine and mill; but that one Patrick Kelly and the present appellant, Andrew J. Davis, claimed some interest in the premises affected by the lien; and hence the three were made defendants. The prayer of the bill was for judgment in favor of the plaintiff to the amount of his claim, $3,787.50, with interest from June 25, A. D. 1871, at the rate of ten per cent.; that the property should be sold to pay the claim, and the rights of the defendant in it should be barred; and that Hendrie should be adjudged to pay any deficiency, if any, that remained after such sale.

Hendrie made no answer. Kelly filed an answer denying the justice of Alvord's claim and denouncing it as fraudulent, and setting up a claim of his own for work and labor done for Hendrie on the premises in question to the amount of $235, with interest, to enforce which he had commenced a suit in the same court on September 27, A. D. 1871, prior to the suit in this cause.

Davis, also, filed his answer, denying the justice of Alvord's claim, and that he had done any labor to entitle him to a lien, and alleging that the pretended accounting between Alvord and Hendrie was a fraudulent attempt to defeat the rights of Davis, and that the claim itself was a fraud upon its face. Davis here, also, and in a supplemental answer, states his own interest in the premises to consist of four mortgages, as follows: the *first* bearing date September 10, 1868, to secure $5,400 due to him from Hendrie, with interest at the rate of five per cent. a month; the *second* dated September 17, 1870, to secure two notes given to him by Hendrie, one for $2,000, dated February 15, 1869, with interest at four per cent. a month, and the other for $9,444, dated June 7, 1869, with same rate of interest, both being

payable in six months from date; the *third* mortgage being one from Hendrie to one Norval Harrison on the mill property only, dated October 2, 1869, to secure a note for $4,900, with interest at 2½ per cent. a month, which mortgage was assigned to Davis on December 13, 1870; and the *fourth* mortgage being one from Hendrie to one W. B. Evarts, also on the mill property alone, dated January 26, 1870, to secure a note for $1,725, with interest at four per cent. a month, which mortgage was assigned to Davis on December 1, 1870. Suits had been instituted to foreclose the two last-mentioned mortgages, and decrees had been rendered in favor of Davis in both instances before the commencement of this suit, though it seems that both decrees remained unexecuted, the amount due on the one being $8,759.50, and on the other $3,864.

Issue was thereupon joined and testimony taken. On the part of the plaintiff, he himself, E. B. Hendrie, (son of the defendant Hendrie,) Milo Courtright, and J. C. Ricker testified.

The plaintiff testified that he was hired by the year at the rate of $2,500 a year, to work half on the mill and half on the mine; that he commenced work on August 1, 1869, and continued until May, 1871; and that he had no settlement with Hendrie until he quit work. On cross-examination, he stated that the mill was completed in the fall of 1869; that some iron guides were put in during the summer of 1870; and that, after that, nothing was done except to repair whenever repairs were needed. He was to be paid by the year, at the end of each year.

E. B. Hendrie and Milo Courtright corroborated this testimony. J. C. Ricker's evidence was merely to the effect that the township lines in the locality of the mine had not been sectionized.

The notices of lien were also introduced in evidence, as were certain deeds and agreements under which Hendrie

held the property, which showed that Hendrie derived his title from one James W. Whitlatch.

On the part of the defendant Davis, the appellant here, Patrick Kelly, Solomon Starr, and George B. Foote were called as witnesses. Kelly testified that Alvord spent most of his time on the mill, and did no work on the mine under ground. Starr, the receiver of the land office at Helena, produced the record of that office, showing the issue of a patent for the property in question to Walter Trumbull and others; and Foote, the surveyor, testified that the property mentioned in the patent was the same mentioned in the bill of complaint. The mortgages from Hendrie to Davis were then introduced in evidence, together with the mortgages from Hendrie to Norval Harrison and W. B. Evarts, and the proceedings instituted to enforce the two latter, as set forth in Davis's answer to Alvord's bill.

Upon these pleadings and proofs, the District Court decreed that the plaintiff Alvord should recover from the defendant Hendrie the sum of $4,546, with interest from the date of the decree, at the rate of ten per cent. until paid; that the mill and mine should be sold, and upon such sale, Hendrie, Davis, and Kelly should be barred from any further claim in the property; and that the proceeds of sale should be applied to the satisfaction of the liens on the property in their respective order of priority, which was declared to be the following:

I. In regard to the mill:

1. The lien of plaintiff Alvord, amounting to $1,893.75, and interest from June 25, 1871.

2. The mortgage to Norval Harrison, now held by Davis.

3. The mortgage to W. B. Evarts, now held by Davis.

4. The amount due to Davis under his mortgage of September 19, 1870, provided the same is not paid

by a sale of the mine.

II. In regard to the mine:

1. The amount due on Davis's mortgage of September 10, 1868.

2. The amount due Alvord, amounting to $1,893.75, with interest from June 25, 1871.

3. The amount due Kelly under lien of September 10, 1869.

4. The amount due to Davis under his mortgage of September 19, 1870, provided the same is not paid by sale of mill.

The defendant Davis appealed from this decree; but the supreme court of the Territory affirmed the decision of the lower court; and thereupon Davis brought the case to this court for final revision.

Assignment of Errors.

The court below erred,—

1st. In decreeing a sale of the property when it was not shown that defendant Hendrie had any title to it.

2d. Because the plaintiff Alvord had no lien, under the statute of Montana, on the property in question.

3d. Because, if he ever had a lien, his right thereto had expired before the notice was filed and the suit brought.

4th. Because in the notice of lien the amount is overstated, and the claim is therefore void.

5th. Because, even if the plaintiff had a lien, it was subsequent to the liens of the appellant Davis, and the relative priorities have been incorrectly stated by the court.

POINTS ON BEHALF OF APPELLANT.

I. While the appellant made no effort, and probably was unable in the nature of things, to prove actual fraud or

fraudulent collusion between Alvord and Hendrie, yet he is justified in suggesting that suspicious circumstances exist tending to discredit the plaintiff's claim; such as the fact that the alleged accounting took place on the 25th of June, 1871, and the notice of lien was filed next day, and no effort was made by Hendrie to pay the debt, and his inability was not shown; also, that, at that accounting, the liability was equally apportioned by them upon the mill and mine, when it is shown that there was very little work done by Alvord, at any time, upon the mine; also, that Hendrie permitted the case to go by default.

II. The law of Montana on the subject of liens, in favor of mechanics and laborers, is as follows:

"SEC. 1. Every mechanic, builder, lumberman, artisan, "workman, laborer, or other person, who shall do or per- "form any work or labor upon, or furnish any material, "machinery, or fixtures for any building, erection, bridge, "flume, canal, ditch, mining claim, quartz lode, ranch, city "or town lots, or other improvements upon land, or for "repairing the same, upon complying with the provisions "of this act, shall have for his work or labor done, or ma- "terial, machinery, or fixtures furnished, a lien upon such "building, erection, bridge, flume, canal, ditch, mining "claim, quartz lode, ranch, city or town lots, or other im- "provements, to secure the payment of such work or labor "done, or material, machinery, or fixtures furnished.

* * * * * * *

"SEC. 6. It shall be the duty of every, all, persons, except "as has been provided for sub-contractors, who wish to avail "himself, themselves, of the benefits of this act, to file with "the recorder of the county in which the building, erection, "bridge, flume, canal, ditch, mining claim, quartz lode, "ranch, city or town lots, or other improvement upon land "to be charged with the lien, is situated, and within sixty "days after the things aforesaid shall have been furnished, "or the work or labor done or performed, a just and true "account of the demand due or owing to him, after allow- "ing all credits, and containing a correct description of the

"property to be charged with said lien, and verified by affi-
"davit.

* * * * * * * *

"SEC. 8. The liens for work done, or labor done, or
"things furnished, as specified in this act, shall have prior-
"ity in the order of filing the accounts thereof, as aforesaid,
"and shall be preferred to all other liens and incumbrances
"which may be attached to or upon the building, erection,
"or other improvement, and to the land upon which the
"same is situated, to the extent aforesaid, or either of them,
"made subsequent to the commencement of the work on
"the erection of said building or other improvement.

"SEC. 9. The entire land * * * shall be subject to
"all liens created by this act, to the extent, and only to the
"extent, of all the rights, title and interest owned therein
"by the owner or proprietor of such building, erection, or
"other improvement, for whose immediate use or benefit
"the labor was done or things were furnished; and when
"the interest owned in such land by such owner or proprie-
"tor of such building, erection, or other improvement, is
"only a leasehold interest, the forfeiture of such lease for
"the non-payment of rent * * * shall not forfeit or im-
"pair such liens so far as concerns the buildings, &c., &c.

"SEC. 10. The liens aforesaid shall attach to the buildings,
"erections, or improvements for which they were furnished,
"or the work was done, in preference to any prior lien or
"incumbrance, or mortgage upon the land upon which said
"buildings, erections, or improvements have been erected or
"put; and any person enforcing such lien may have such
"building, erection, or improvement sold under execution,
"and the purchaser may remove the same within a reason-
"able time thereafter.

"SEC. 20. All suits under this act shall be commenced
"within * * * six months * * * from the time
"of filing the account or statement, * * *

"SEC. 21. Every person, including all *cestuis que trust*,
"for whose immediate use, enjoyment, or benefit, any
"building, erection, or improvement shall be made shall be
"included by the word 'owner' or 'proprietor' under this
"act, not excepting such as may be minors over the age of
"eighteen years, or married women."

It is respectfully submitted that, under this law, it was incumbent on the plaintiff to show that the defendant, Hendrie, had some title to the property on which the work claimed to have been done by him was performed. The twenty-first section, above quoted, has not the application claimed for it by the territorial court. The purpose of that section was merely to place *equitable* owners of property, as well as married women and minors over eighteen years of age, on the same footing with ordinary legal owners. It was not certainly intended that any man might cause a lien to attach to property without the knowledge and consent of the real owner. A lien is necessarily founded on contract; and a contract with one having no title or interest whatever cannot be allowed to effect the rights of the true owner.

The work in this case was done for Hendrie. The proof shows the title to have been in "The Whitlatch Union Mining Company," (see Record, pp. 23, 24.)

III. It is exceedingly doubtful, from the evidence, whether the plaintiff ever did any work on the mine sufficient to give him a lien. Nearly all his work was on the mill, (see testimony of Alvord and Kelly, Record, pp. 12 and 22.) But, in regard to both mill and mine, if the plaintiff ever had a lien, it was discharged and released by his failure to assert and maintain it within the time prescribed by law.

The work on the mill was substantially completed in the fall of 1869, or summer of 1870. Nothing was done after that, except trivial repairs, the character and extent of which are not proved, (Record, pp. 12, 15, and 22.) Now trivial repairs are not the subject of lien.

Houck on Liens, sec. 165.

The lien, though founded on contract, is not given by the contract, but by the fact that work or labor was performed. The agreement of the parties that half the work should be done on the mill and half on the mine, if there ever was

such an agreement, could not create a statutory lien. It was only the actual performance of the work that entitled the party performing it to a statutory lien. Consequently, the time of commencement or termination of the contract has nothing to do with it, (15 Ill., 189.)

As to the mine, it does not appear that the plaintiff did any work at all of any consequence on it, (Record, pp, 12, 15, 22.) None whatever is specified or proved. The notice of lien does not specify any. The bill of complaint does not specify any. The testimony is entirely silent on the subject. This is certainly a slender showing whereon to base a decree seriously affecting the rights of third parties. The statute gives a lien only for work actually done. When it was denied that any work was done, it was incumbent on the plaintiff to prove what work had been performed. This he has utterly failed to do. He has therefore no lien under the statute.

Codified Laws of Montana of 1872, (Chap. 40, sec. 1, above quoted.)
Houck on Liens, sec. 139.
Gaty *vs.* Casey, 15 Ill., 189.

The contract in this case is, on the theory of the plaintiff, held by the territorial court to have been one continuous contract; and only upon this ground, and the further theory that the labor performed extended throughout the whole period covered by the contract, can the claim of lien be supported. But if the lien depends on the contract, and the contract was in fact divisible, or was rather a contract from year to year, then a right of lien accrued at the end of the year, and was lost by the plaintiff's failure to comply with the statutory requirements within the period of sixty days after the end of the year.

The contract was not, as assumed by the territorial court, one continuous contract. Alvord himself testifies that he

"was hired by the year;" and that he was "to be paid by the year, at the end of the year." (Record, pp. 12, 22.) His contract was fully completed at the end of the year; and if he and Hendrie chose to continue it upon the same terms, their right to do so as between themselves ought not to be allowed to have the extraordinary effect of impairing the intervening rights of others. If the plaintiff could have proceeded to enforce his lien at the end of one year, as he had undoubtedly the right to do, his right was then complete, and the period of limitations commenced to run against his claim in respect to the labor performed within that year, and became an absolute bar to his lien sixty days thereafter.

Webb *vs.* Sharp, 13 Wallace, 11.
Sweet *vs.* James, 2 R. I., 270.
Livermore *vs.* Wright, 33 Mo., 31.
Hubbell *vs.* Schreyer, 14 Abbott's Prac. R., (N. Y.,) 284.
Spencer *vs.* Barnett, 35 N. Y., 94.

On the theory of the complainant, adopted by the supreme court of Montana, the contract was a continuing one, and might have lasted during the lives of the parties. It is a logical consequence of the decision of that court, that, had the parties not chosen to account with each other for twenty, thirty, or fifty years, their accounting at the end of each period, and the complainant's right of lien would have related back to the beginning of the period, and would have taken precedence of all intervening claims and rights. Such a consequence is too startling to be admitted.

Moreover, the contract was a verbal one; and it is therefore doubtful whether, if the construction claimed for it be the correct one, it was valid under the Statute of Frauds.

IV. If our understanding of the law is correct, the plaintiff's claim of lien was overstated, and was consequently void.

The sixth section of the Montana lien law above quoted provides, that the claimant "shall file with the recorder of the county * * * within sixty days * * * *a just and true account* of the demand due or owing to him, &c., &c." Upon a precisely similar statute in Massachusetts, the supreme court of that State decided that an overcharge of four dollars rendered a certificate of lien null and void.

Lynch *vs.* Cronan, 6 Gray, 531.
Houck on Liens, sec. 210.
Carson *vs.* White, 6 Gill, 17, 28.

V. At the time of filing his certificate, the plaintiff Alvord had, at most, a lien only for the work and labor performed between the 1st of August, 1870, and the 1st of May, 1871. All the liens held by the appellant Davis, with the exception of the mortgage of September 19, 1870, were prior, therefore, to the inception of Alvord's lien, and should have been allowed to take precedence of it. And as to the mortgage of September 19, 1870, if no work was done after the first of August of that year, and none is shown to have been done after that, there is nothing to affect even the lien of that mortgage. Something more than a mere accounting, that might have been fictitious, between Alvord and Hendrie, is required to give a lien that would seriously impair the vested rights of third parties.

R. T. MERRICK,
M. F. MORRIS,
For Appellant Andrew J. Davis.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1876.

No. 217.

ANDREW J. DAVIS, APPELLANT,

vs.

HARVEY ALVORD, APPELLEE.

Appeal from the Supreme Court of the Territory of Montana.

BRIEF OF APPELLEE.

This was a proceeding in a District Court of Montana, under the Mechanics' Lien Law of that Territory, instituted by Alvord, the present appellee, to enforce mechanic liens for certain work done upon a quartz mine and quartz mill, under contract with the owner, one Charles Hendrie.

As authorized by the statute, Hendrie, the owner of the property, and Andrew J. Davis and Patrick Kelly, claiming an interest as mortgagees in the property, were made defendants.

The remedy sought by the plaintiff, in accordance with the statute, was a judgment *in personam* against the debtor and owner, Hendrie, and the establishment and enforcement of the lien against the property, and in preference to the respective claims of the defendant mortgagees, Davis and Kelly.

Section 18 of chapter XL of Codified Laws of Montana provides that, "when the debtor has been served with summons, or appears to the action, the judgment, if for the plaintiff, shall be against such debtor, as in ordinary cases, with the addition that if no sufficient property of the debtor can be found to satisfy the judgment, then the residue thereof be levied out of the property charged with the lien thereof, which property shall be correctly described in said judgment." (Laws of Montana, chap. XL, secs. 17, 18, page 512.)

Section 13 authorizes all persons interested in the matter in controversy, and in the property charged with the lien, to be made parties.

The summons having been served on all the defendants, and the debtor defendant, Hendrie, having failed to appear, and the mortgagees defendants, Davis and Kelly, having filed answers to the complaint, the case was tried by the court, who made a finding of facts, and entered judgment, in accordance with the statute, against Hendrie for $4,546, with interest and costs, with the addition that, in case no other sufficient property belonging to him be found, moieties of the amount of such judgment should be levied out of Hendrie's interest in the several properties against which the liens were established, and with proper orders for the distribution of the proceeds of the sale of the same according to the declared priorities of the respective claims of the plaintiff, and defendants Davis and Kelly.

Finding of Facts, Rec., p. 38.—

Judgment, Rec., p. 39–42.—

The defendant Davis *alone* appealed from this judgment to the Supreme Court of the Territory. (Rec., p. 43, fol. 117.)

The debtor defendant, Hendrie, and the other mortgagee defendant, Kelly, took no appeal. The Supreme Court affirmed the judgment and decree of the District Court. (Rec., p. 52, fol. 147.)

The case is now here on *appeal* by *Davis* alone from this judgment of the Supreme Court of the Territory. (Rec., p. 53, fol. 148.)

In the absence of brief or assignment of errors by appellant, some general observations merely can be submitted on the part of appellee.

First.

This Court appears to have considered that cases of this character under the mechanics' lien law of this Territory, should be brought here by *writ of error*, and not by appeal.

If that is the rule, the present appeal of Davis must be be dismissed for want of jurisdiction.

In *Davis* v. *Bilsland*, (18 Wall., 659,) which was a suit of this kind, brought here on a *writ of error*, the point was distinctly made by defendant in error that *appeal*, and not writ of error, was the proper remedy, and that the writ of error should be dismissed. But this Court disregarded that view; and, taking jurisdiction of the case, affirmed the decree on its merits.

Germain v. *Mason*, (12 Wall., 260,) also a mechanic's lien suit, coming from Montana, was likewise brought here as a case at law by writ of error, and not as a suit in equity by appeal.

Under the Montana statute, where the debtor is personally served with process, or appears, in an action to enforce a mechanic's lien, the judgment is primarily *in personam* for the debt, as in an action of assumpsit, with a superadded judgment for the enforcement of the lien *in rem;* and execution goes first against the general property of the defendant, and if none is found, then a special *fieri facias* issues against the property bound by the lien. (Secs. 15, 17, 18, 19.)

These provisions would seem to indicate that the pro-

ceeding was intended to have the character of an action at law, rather than a suit in equity.

Second.

If the case can be properly brought here by appeal, the judgment or decree in question is such a joint judgment as cannot be appealed from by Davis alone without summons and severance, or some proceeding of an equivalent character, under the doctrine of *Masterton* v. *Herndon*, (10 Wall., 416,) and *Simpson* v. *Greeley*, (20 Wall., 157.)

In *Germain* v. *Mason* (12 Wall., 261) this Court allowed the debtor defendant, in a suit of this character, against whom a distinct, personal judgment for money was obtained, to sue out a writ of error without joining the lien creditors, co-defendants with him in the action, expressly upon the ground that the judgment of which he complained was "such a *separate* judgment against *him* as authorized him to ask a review of it here, without joining his co-defendants in the court below, who have not thought proper to disturb the judgment."

By reason of this appeal of one of the def lants, Davis, the plaintiff, who has a personal judgment against Hendrie, has been delayed for two years and more in issuing his execution, although Hendrie is satisfied with the judgment, and has no desire to have it reversed.

If, in a suit like this, against numerous lien creditors, each defendant may appeal alone, the court may be compelled to decide twenty times the same question upon the same record.

Third.

The merits of the case, as determined by the findings and judgment of the District Court, are so elaborately presented in the opinion of the Supreme Court of the Territory, delivered by Mr. Justice Servis, and printed in the record, that it is quite unnecessary for the appellee to sub-

mit further argument in support of the judgment of the court below.

Opinion of Servis, J., Rec., pp. 48–52.

It is presumed that this court in a case of this character, involving largely matters of fact which have been determined by the concurrent judgments of the District and the Supreme Court of the Territory, especially where it appears, as here, that the whole case was most carefully and elaborately considered and decided in both courts, will compel the appellant to show in the most conclusive manner that those courts have fallen into error before it will reverse their judgments.

The opinion of the Supreme Court, however, is a conclusive vindication of the correctness of the judgment from which this appeal is taken, and appellee may safely rest upon that consideration of the case in asking an affirmance of that judgment.

Fourth.

If the court does not think proper, under the views here presented, to dismiss the appeal, we ask that the judgment be affirmed for the reasons contained in the opinion of the court below.

J. Hubley Ashton,
N. Wilson,
Of Counsel for Appellee.